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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-5414

ILYA WOLSTON,

Petitioner,

v.

THE READER'S DIGEST ASSOCIATION, INC., d/b/a READER'S DIGEST PRESS; BANTAM BOOKS, INC.; BOOK-OF-THE-MONTH CLUB, INC.; MACMILLAN BOOK CLUBS, INC.; JOHN BARRON,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 578 F.2d 427 and is reproduced in the Appendix to this petition at pp. A-1, et seq.[1/] The opinion and order of the District Court

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1/ This Appendix will be hereinafter cited as "App.". References to the Appendix in the court below will be cited as "CA App.".

granting defendants' motion for summary judgment is reported at 429 F. Supp. 167 and is reproduced at App. A-17, et seq.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on May 23, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). An Order extending time to file the petition for writ of certiorari until September 21, 1978 was entered on August 7, 1978.

QUESTIONS PRESENTED

I. Is a libel plaintiff necessarily a public figure subject to the rule of New York Times Co. v. Sullivan, 376 U.S. 254, because he had engaged in conduct which resulted in his becoming a defendant in a criminal proceeding?

II. In an action governed by New York Times Co. v. Sullivan, 376 U.S. 254, may a court grant summary judgment to the defendants by accepting the testimony of the author whose state of mind is at issue, and itself choosing among the conflicting inferences which can be drawn from that testimony and other evidence?

STATEMENT OF THE CASE

1. Nature of the Case and Proceedings Below

This matter comes to the Court from affirmance by the Court of Appeals for the District of Columbia of a final order of the District Court granting the defendants' motion for summary judgment in a libel action brought against the author and

the initial and subsequent publishers of the book KGB: The Secret Work of Soviet Agents ("KGB"). The book falsely describes petitioner Wolston as a Soviet agent and falsely suggests that he had been indicted or convicted of espionage or perjury in connection with espionage investigations. The basis for granting summary judgment, insofar as it was affirmed by the Court of Appeals, was that Wolston was a public figure, required as a matter of law to establish "actual malice" by the defendants, and that the facts, including the testimony of the book's author with respect to his state of mind when he wrote the passages pertaining to Wolston, demonstrated that Wolston "could [not] show enough to go to a jury on the issue of actual malice." (App. A-9).

2. The Plaintiff's Background and Activities

Wolston was born in Russia in 1918, moved to Lithuania as an infant, and thereafter lived in Germany, France and England before coming to the United States in 1939 (CA App. 157-159). He was drafted into the army in 1942 (CA App. 167), was trained as a Russian interpreter, and served as such in liaison work with Soviet military personnel, primarily in Alaska (CA App. 169). During the 1945 San Francisco conferences establishing the United Nations, Wolston was assigned as an interpreter to the Russian delegation's flight crew (CA App. 171). He was honorably discharged in 1946 (CA App. 173).

Following his discharge Wolston went to Europe where he obtained a job as a civilian interpreter with the United States Military Government in Berlin, remaining in this position

when the State Department assumed military government functions. His employment with the State Department ended in 1951 due to a reduction in force (CA App. 181).

Wolston thereupon returned to New York where he enrolled in college and worked part time as the supervisor of a project involving the translation of place names on captured Russian maps (CA App. 189-190). In 1955 he received a full-time job offer from the Army Map Service, and moved to the Washington area (CA App. 192-193). Shortly thereafter, his first child contracted pneumonia and died, followed hard upon by his mother's death (CA App. 193). Wolston went into a state of extreme depression, resigned his position with the Army Map Service, and was treated for his mental condition, treatment which included frequent administration of electric shock therapy (CA App. 194-195).

In January, 1957, the FBI arrested Jack Soble and his wife, Wolston's uncle and aunt, on espionage charges. On the day of the Sobles' arrest, Wolston and his wife were "invited" to FBI headquarters and interrogated for several days. Thereafter Wolston was subjected to successive interrogations in New York and Washington, his appearances in New York being compelled by grand jury subpoenas (CA App. 354).

Meanwhile his treatment for mental disorder continued, including some 13 shock treatments in 1957. Explanations of Wolston's condition were made to the Office of the United States Attorney for the Southern District of New York, and medical certificates were submitted in an unsuccessful effort

to persuade the FBI and the Assistant United States Attorney who was conducting the investigation not to require Wolston to continue to travel to New York for lengthy interrogations (CA App. 354). However, Wolston was served with still another grand jury subpoena, this one returnable on May 27, 1958. He came to New York with his wife to be told that the Grand Jury would not be sitting that day. Instead he was ushered into an interrogation room and subjected to further intense questioning (CA App. 355).

On Saturday, June 28, 1958, petitioner was served with yet another grand jury subpoena which required his attendance in New York on July 1st. He did not appear. An order to show cause why he should not be held in contempt was issued returnable on July 28th. Wolston appeared in court that day and indicated his willingness to testify. His offer to testify before the grand jury was rejected by the Assistant United States Attorney, who first asserted that the grand jury's term had expired the day before, a Sunday, and then stated that in any event he was not prepared to conduct the examination. The grand jury was discharged, and a criminal contempt hearing was commenced. The plaintiff's wife, who was then pregnant with their second child, was called to testify as to Wolston's mental condition on the return date of the subpoena, but she broke down hysterically during the course of her testimony. Rather than subject her and himself to the continued trauma of the trial, and upon assurance that no jail term would be imposed, Wolston pleaded guilty to contempt. A one year sentence was suspended conditioned on subsequent cooperation with federal

authorities,' and Wolston was placed on three years probation (CA App. 355). A brief flurry of newspaper publicity attended the issuance of the order to show cause and the contempt proceedings (CA App. 215-226).

One year later, Boris Morros, a Jack Soble confederate who had been a double agent for the FBI, published a book entitled My Ten Years As A Counterspy. In the book he stated that Soble had told him of a certain "Slava," who had allegedly supplied Soble with information. He also stated that Soble had eventually identified Slava as his nephew, Ilya Wolston. However, Morros made the point that the only information he had pertaining to Wolston had come from Soble whom he knew to be "a confirmed liar" (CA App. 139).

In May 1960, the Federal Bureau of Investigation prepared a report entitled "Expose of Soviet Espionage" for transmittal to and publication by the Internal Security Subcommittee of the Senate Judiciary Committee. The report refers to "Slava", who is described as a "U.S. Army Colonel in Germany", states that Soble identified his nephew Wolston as Slava in 1955 and that following his guilty plea in April 1957, Soble "furnished information identifying Wolston as a Soviet Agent." The report also claimed that Wolston had been "dismissed" from his State Department employment in Berlin in 1951, based upon his "probable identification" as "a Soviet agent" and data concerning "his black market activities" (CA App. 325-326).

These statements were not only incorrect, they were manifestly inconsistent with Wolston's subsequent employment

by the Army Map Service and the fact that Wolston was never indicted for espionage or perjury.

3. The Research and Writing of KGB: The Secret Work of Soviet Agents

In the late 1960's, defendant Barron, then an associate editor of Reader's Digest, engaged in a prolonged feasibility study of work on Soviet espionage. During the course of that study, Barron and other employees of Reader's Digest approached various foreign and domestic security and intelligence agencies to ask for their assistance if the project were to go forward (CA App. 41). The United States agencies contacted included the FBI, CIA, DIA and the State Department (CA App. 42-43, 48). These agencies all indicated that they would cooperate with the author in his project (CA App. 47-52).

In January of 1971 Barron received authorization from Reader's Digest to proceed with the book. He was given permission to travel extensively, to invest as much time and research as was necessary and to take maximum advantage of the worldwide research capacities of the Reader's Digest organization, which included what Barron described as "magnificent" facilities in New York and Paris and staff offices in many foreign countries, including Germany (CA App. 56, 57, 59, 61). A professional researcher was assigned on a full-time basis to assist Barron and did so for over four years (CA App. 87). These aids to accuracy and depth of research were trumpeted in the preface to the book (KGB preface pp. xi, xii).

All editions of KGB published by Reader's Digest and the reprint publishers contained the following defamatory

statements relating to the plaintiff:

> "Among Soviet agents identified in the United States were Elizabeth T. Bentley, Edward Joseph Fitzgerald, William Ludwig Ullmann, William Walter Remington, Franklin Victor Reno, Judith Coplon, Harry Gold, David Greenglass, Julius and Ethel Rosenberg, Morton Sobell, William Pearl, Alfred Dean Slack, Jack Soble, Ilya Wolston, Alfred and Martha Stern."*

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* "No claim is made that this list is complete. It consists of Soviet agents who were convicted of espionage or falsifying information or perjury and/or contempt following espionage indictments or who fled to the Soviet bloc to avoid prosecution * * *." (emphasis supplied)(CA App. 119).

In addition, the index to KGB contains the reference: "Wolston, Ilya, Soviet agent in U.S." (CA App. 121).

These statements falsely identify the petitioner as a Soviet agent, join his name with those of infamous figures of Soviet espionage, and suggest that petitioner had been indicted for espionage.

The source of information concerning Wolston upon which Barron purportedly relied was the FBI report "Expose of Soviet Espionage" (CA App. 296; 64). Barron stated by affidavit that: "At no time have I been aware of any fact that would give me reason to doubt the truth of the FBI Report or of any statement in it." (CA App. 295). Nonetheless, he knew that notwithstanding the report's purported identification of Wolston as a Soviet agent who had committed espionage against the United States, Wolston had not been indicted for espionage, or perjury or the making of false statements in connection with the

investigation in which he was compelled to testify (CA App. 57). Barron also admitted to having been "very familiar" with the Boris Morros book, and of the distrust of Soble's veracity which Morros expressed in that book (CA App. 86). Nevertheless, Barron made the statements concerning Wolston despite their seriousness, without utilization of the extensive research facilities available to him, without any inquiry of the federal agencies which had assured him of their willingness to cooperate, and without investigation of any kind (CA App. 33, 42, 45, 50-51, 62, 72), notwithstanding that any inquiry would have established, among other things, that Wolston had not been "dismissed" by the State Department, that Wolston had been employed by the Army Map Service in an obviously sensitive position following his purported identification as a Soviet agent, and that the description of Slava as a U.S. Army Colonel did not mesh with Wolston's actual position as a low rank civilian employee.

On this record, the courts below first concluded that Wolston was a "public figure" and then, according total acceptance to Barron's self-serving statement that he harbored no doubts as to the accuracy of the FBI report (App. A-12), determined that summary judgment should be granted thereby depriving Wolston of an opportunity to have a jury assess Barron's credibility and perhaps reach inferences with respect to the publication of these defamatory statements about petitioner different than the inferences drawn by the judges who considered the matter.

REASONS FOR GRANTING THE WRIT

I.

A. The Determination of the Courts Below That Petitioner is a Public Figure is Contrary to the Decisions of This Court

In Time, Inc. v. Firestone, 424 U.S. 448, the Court said:

> "[W]hile participants in some litigation may be legitimate 'public figures' either generally or for the limited purpose of that litigation, the majority will resemble the respondent, drawn into a public forum largely against their will in order to attempt to obtain the only redress available to them or to defend themselves against actions brought by the state or by others. There appears little reason why these individuals should substantially forfeit that degree of protection which the law of defamation would otherwise afford them simply by being drawn into a courtroom." (Id. at 457) (emphasis supplied).

This Court therefore concluded that notwithstanding Mrs. Firestone's involvement in a notorious divorce action, her adulterous conduct which had made the divorce proceeding a matter of substantial press and public interest, and her own resort to the media through the convening of a press conference, she was not a "public figure" and was entitled to the same opportunity to prove her case for libel as any other person. Thus, the Court further marked its departure from the plurality opinion in Rosenbloom v. Metromedia, Inc., 403 U.S. 29, a departure which had commenced with the opinion in Gertz v. Robert Welch, Inc., 418 U.S. 323, which had emphasized the legal significance of voluntary actions by "public figures" in "thrust[ing] themselves to the forefront of particular controversies in order

to influence the resolution of the issues involved" to the exclusion of the contextual consideration that the controversial matter was of interest to the public. (Id. at 345).

Given the teaching of Firestone, we would have thought it plain that Wolston's involvement in a criminal proceeding could not work a metamorphosis transforming him from a private person into a public figure. Nonetheless, the courts below held that he was a public figure, purporting to find the requisite voluntariness in Wolston's failure to comply with one grand jury subpoena which in turn led to his involvement in a criminal contempt proceeding. However, if any conduct which produces the need "to defend [oneself] against actions brought by the state" is perforce sufficient to make one a public figure, the distinction between public and private figures delineated by Gertz and Firestone would be rendered meaningless in any context involving criminal proceedings.

To be sure, there could be circumstances under which the conduct which leads to a criminal proceeding is the functional equivalent of mounting a public rostrum. This would be true in almost every instance of arrest for public protest on a political or social issue, but there is not the slightest indication that that was the case here. The record shows with unusual clarity that in failing to comply with one of a series of jury subpoenas, Wolston was trying to crawl into a hole, not to mount a rostrum. In concluding that Wolston was nonetheless a public figure, the courts below decided this federal constitutional question in a way in conflict with the recent decisions of this court.

B. Alternatively, if Firestone Does Not Clearly Stand for the Proposition That Persons Like Wolston Are Not Public Figures, There is a Question of Substantial Importance Which the Court Has Not, But Should Decide

Petitioner believes that the teaching of Firestone is clear and controlling in his favor. If it is not, then the question presented is one which is both important and recurrent and should be settled by this Court for the benefit of federal and state inferior courts as well as the media.

Commentators have expressed the view that Firestone has failed to provide a clear definition of standards.

> "[M]edia will have serious difficulty in determining who is a public figure within the purview of the New York Times standard. * * * How restrictive the definition may be will require a further pronouncement from the Court." 1 A.B. Hanson, Libel and Related Torts, ¶ 141 (Supp. 1976).

See also: Comment, Defamation Law After Time, Inc. v. Firestone, 13 Idaho L. Rev. 53 (1976); Case Note, Constitutional Law - Defamation - the New York Times Standard and Reports of Judicial Proceedings: Time, Inc. v. Firestone, 424 U.S. 448 (1976), 37 Ohio S.L.J. 881, 890 (1976). If Firestone, which arose out of a civil divorce proceeding, presents general difficulties in determining who is a public figure, a case arising from the context of a criminal proceeding must present exceptional difficulty.

The state of confusion among the lower courts in applying Firestone to such a context is demonstrated in the opinion of the United States Court of Appeals for the Fourth Circuit in Anderson v. Stanco Sports Library, 542 F.2d 638, which, taking

cognizance of Firestone, stated that it was "not clear whether * * * plaintiff [a convicted murderer] falls within [the public figure or private person] categories." (Id. at 640). The court considered that Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, "may be seen as supporting the conclusion that Anderson is such a public figure" but saw tension between such a conclusion and the language of this Court's Firestone opinion quoted at p. 10 of this petition. (Id. at 640 n.5). The Fourth Circuit was able to leave its quandary unresolved by proceeding to decide Anderson on other grounds, but such an opportunity will not necessarily occur in other cases.

If, as Firestone commands, one disregards the high public interest context of petitioner's action in failing to comply with one of a series of harassing subpoenas, the decision of the court below can be seen clearly as a holding that any action whatever that results in a person being subject to criminal process, be it failure to comply with a subpoena or the commission of an aggravated felony, makes that person a public figure and strips him of that degree of protection which the law of defamation would otherwise afford. Here, Wolston, for having failed to comply with a subpoena, was falsely identified as a Soviet agent without having redress. His punishment for failure to obey a subpoena was meted out by a federal judge. That punishment should not be extended by making him fair game for one who would carelessly name him as an infamous spy.

Reports concerning those who are involved in criminal proceedings are the daily meat of the press as well as the subject of retrospective examination by periodicals and books.

Libel complaints brought by those who have been obliged to defend themselves in criminal proceedings can fairly be characterized as commonplace. Arising as they do in a context in which First Amendment press protection is in conflict with individual rights, the question is one which warrants elucidation by the Court as to whether, and under what circumstances, such persons are and are not public figures.

II.

The Grant of Summary Judgment on the Malice Issue is in Conflict With the Decisions of This Court and of Another Court of Appeals

In determining that the defendants were entitled to summary judgment on the issue of whether there was "malice" in the New York Times sense, the Court of Appeals accepted as true the deposition testimony and affidavit of the defendant Barron (App. A-12). It thereupon asserted: "To meet this evidence of good faith and get to a jury Wolston was required to produce evidence that notwithstanding his asserted reliance upon the book and report Barron 'in fact entertained serious doubts as to the truth of his publication' and recklessly disregarded whether it was true or false. St. Amant v. Thompson, 390 U.S. 727, 731 (1968)." (Id.). The court then made its own choice among the conflicting inferences which were possible from the evidence adduced by plaintiff, and again accepted and relied on the explanations in Barron's affidavit and deposition.

It is plain that the court erred in crediting Barron rather than allowing a jury to pass on his credibility, and

that it compounded that error in resolving the conflicting inferences in favor of the party that had moved for summary judgment rather than against that party. It is only necessary to apply to this case principles which are well established by this Court, but to which the District of Columbia Circuit has made an unwarranted exception in defamation suits which are governed by New York Times -- an exception expressly disapproved by another Court of Appeals.

Under the New York Times malice standard the state of mind of the defendant is central to the issue of liability once it was determined that plaintiff is a public figure. In Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, the Court said:

> "We look at the record on summary judgment in the light most favorable to Poller, the party opposing the motion, and conclude here that it should not have been granted. We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice.'" 2/

These principles were reaffirmed at the last Term in Agosto v. Immigration & Naturalization Service, 98 S.Ct. 2081:

2/ 368 U.S. at 473, footnote omitted.

> "* * * just as a district court generally cannot grant summary judgment based on its assessment of the credibility of the evidence presented, see Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, [467-468] (1944); 6 Moore, Federal Practice ¶ 56.02[10], at 56 45 (2d ed. 1976), so too a court of appeals is not at liberty to deny an individual a de novo hearing on his claim of citizenship because of the court's assessment of the credibility of the evidence * * *. Particularly where the evidence consists of the testimony of live witnesses concerning material factual issues, it will seldom if ever be appropriate to deny a de novo hearing, since '[i]t is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised.' Poller v. Columbia Broadcasting System, Inc., supra, 368 U.S. at 473."

It is also well established that "[o]n summary judgment the inferences to be drawn from the underlying facts contained in [the moving party's] materials must be viewed in the light most favorable to the party opposing the motion * * *." Adickes v. Kress & Co., 398 U.S. 144, 158-159, quoting United States v. Diebold, Inc., 369 U.S. 654, 655.

Nothing in this Court's decisions justifies a different standard for determining when a summary judgment may be granted when the movant is a defendant who relies on New York Times malice test. The passage from St. Amant v. Thompson which was quoted above reiterates the substantive standard of liability and says nothing about the method of proof. On the contrary, the Court said later in the same opinion:

> "The defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true." 390 U.S. 732.

Nevertheless, the District of Columbia Circuit has established a special rule for determining whether a defendant is entitled to summary judgment on the "malice" issue.

In Washington Post Co. v. Keogh, 365 F.2d 965 (D.C. Cir.), cert. denied, 385 U.S. 1011, which was cited by the court below in introducing its discussion of the malice issue (App. A-9), the court, after describing the important functions of summary judgment, stated: "In the First Amendment area, summary procedures are even more essential. For the stake here, if harassment succeeds, is free debate." (Id. at 968). Judge Wright, the author of that opinion, reaffirmed those views in Wasserman v. Time, Inc., 424 F.2d 920, cert. denied, 398 U.S. 940. On behalf of himself and Circuit Judge Robinson, he wrote (id. at 922):

> "In my judgment New York Times Co. v. Sullivan makes actual malice a constitutional issue to be decided in the first instance by the trial judge applying the Times test of actual knowledge or reckless disregard of the truth. Cf. Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed. 2d 908 (1964). Unless the court finds, on the basis of pretrial affidavits, depositions or other documentary evidence, that the plaintiff can prove actual malice in the Times sense, it should grant summary judgment for the defendant. Washington Post Co. v. Keogh, 125 U.S.App.D.C. 32, 365 F.2d 965, 20 A.L.R. 3d 972 (1966), cert denied, 385 U.S. 1011, 87 S.Ct. 708, 17 L.Ed.2d 548 (1967). Compare Goldwater v. Ginzburg, 2 Cir., 414 F.2d 324, 336-337 (1969), cert. denied, 396 U.S. 1049, 90 S.Ct. 701, 24 L.Ed.2d 695 (1970)."

But the Court of Appeals for the Ninth Circuit has expressly disagreed with the District of Columbia Circuit. In Guam Federation of Teachers, Local 1581, A.F.T. v. Ysrael, 492 F.2d 438, cert. denied, 419 U.S. 872, the court said:

"However, with respect, we are not persuaded by the second phase of Judge Wright's analysis in Wasserman which suggests that in deciding these motions, the trial court should judge the credibility of witnesses and draw its own inferences from the evidence. We think that in a libel case, as in other cases, the party against whom a motion for summary judgment, a motion for a directed verdict, or a motion for a judgment notwithstanding the verdict is made is entitled to have the evidence viewed in the light most favorable to him and to all inferences that can properly be drawn in his favor by the trier of fact. We think, too, that in such cases it is not only not the duty of the judge, or of this court of appeal, to weigh the credibility of the evidence, or to draw inferences in favor of the moving party (except, of course, when no contrary inference can legitimately be drawn), but that neither the judge nor this court on appeal has the authority to weigh credibility or to choose among legitimate inferences in such cases.

The standard against which the evidence must be examined is that of New York Times and its progeny. But the manner in which the evidence is to be examined in the light of that standard is the same as in all other cases in which it is claimed that a case should not go to the jury. If the evidence, so considered, measures up to the New York Times standard, the case is one for the jury, and it is error to grant a directed verdict, as the trial judge did in this case." (Id. at 441, emphasis in original).

It is plain that the Court of Appeals for the District of Columbia Circuit, faithfully following its own practice, did in this case precisely that which the Ninth Circuit held should not be done. There is, therefore, a clear conflict in the Circuits on the question whether, as the Ninth Circuit put it, New York Times speaks to "the manner in which the evidence is to be examined" as well as the "standard" of liability. (Id.). That is a question which can potentially arise in every defamation suit involving a public figure or official. The rule in the District of Columbia Circuit represents an additional

obstacle to recovery by such plaintiffs, and as such alters the balance which this Court struck between the interests of individuals in their own reputation and that of the press to comment on public affairs and public figures. The case is thus a variant of the problem presented by Herbert v. Lando, No. 77-1105, cert. granted, March 20, 1978. [3/] Moreover, the decision below is plainly inconsistent with the principles established by this court's decisions in interpreting F.R.Civ.P. Rule 56. Accordingly, certiorari should be granted on this issue as well. Indeed, the Court of Appeals' error is so patent that if the "public figure" issue does not independently merit review, summary reversal of the summary judgment may be appropriate here, as it was in Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc., 394 U.S. 700.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

3/ This parallel is recognized by counsel for respondents in Herbert who rely on the D.C. Circuit summary judgment rule, but without mentioning the Ninth Circuit's contrary view. See Brief for Respondents, No. 78-1105, pp. 58-59. See also brief for New York Times, et al. as amici curiae, pp. 20, 24-25. While we express no views concerning the outcome in Herbert, it is clear that the argument for a special rule favoring the defendant which is made there against the ordinary rules of discovery -- that they would conflict with the First Amendment inhibiting press from obtaining information -- has no counterpart here. The only argument for not applying the ordinary rules is that the defendant should be protected from the expense of litigation, a factor which, as we read New York Times v. Sullivan, the Court has already considered in defining the privilege and in rejecting the absolute immunity proposed by the concurring Justices.

Supreme Court, U. S.
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APPENDIX

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THE READER'S DIGEST ASSOCIATION, INC., d/b/a READER'S DIGEST PRESS; BANTAM BOOKS, INC.; BOOK-OF-THE-MONTH CLUB, INC.; MACMILLAN BOOK CLUBS, INC.; JOHN BARRON,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil No. 75-0459

ILYA WOLSTON

v.

READER'S DIGEST ASSOCIATION, INC., ET AL.

DOCKET ENTRIES

Dates	Proceedings
3-31-75	Complaint, appearance, jury demand
3-31-75	Summons issued
4-4-75	Summons issued
4-18-75	Notice by plaintiff to take deposition of John Barron
5-5-75	ORDER extending time to May 5 for defendants to answer Complaint
5-12-75	Answer of defendants to complaint. Appearance of Peter B. Hamilton
5-12-75	CALENDARED CD/N
5-15-75	Stipulation extending time to May 19 for defendants to answer complaint
6-5-75	Deposition of John Barron
7-21-75	Status Call
8-8-75	Notice by defendants to take deposition of plaintiff
3-19-76	Deposition of Ilya Wolston
4-7-76	Motion of defendants for summary judgment; affidavits of John Barron, Marcus H. Jaffe, Al Silverman, William Houghton, Stephen Bair and Morton L. Levin
4-8-76	Request of defendant to file book as an Exhibit to John Barron's deposition

Dates	Proceedings
4-26-76	Stipulation extending time to May 10 for plaintiffs to respond to motion for summary judgment
5-12-76	Stipulation extending time to June 14 for plaintiffs to respond to motion for summary judgment
6-15-76	Motion by plaintiff for leave to file points and authorities in excess of 35 pages
6-18-76	Motion of plaintiff for leave to file points and authorities in excess of 35 pages; granted
9-13-76	Reply memorandum by defendants in support of motion for summary judgment
10-26-76	Motion of defendants for summary judgment argued and taken under advisement
1-31-77	Judgment for defendants against plaintiff
2-3-77	Memorandum Opinion and Order filed 1/31/77 granting motion of defendant for summary judgment
2-23-77	Notice of Appeal by plaintiff from Order of 1/31/77

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civil No. 75-0459

ILYA WOLSTON,
3750 39th Street, N.W.
Washington, D.C.
(202) 363-4049, PLAINTIFF

—against—

THE READER'S DIGEST ASSOCIATION, INC.,
doing business as READER'S DIGEST PRESS
200 Park Avenue
New York, New York

BANTAM BOOKS, INC.
666 Fifth Avenue
New York, New York

BOOK-of-the-MONTH CLUB, INC.
1225 South Market
Camp Hill, Pennsylvania

MACMILLAN BOOK CLUBS, INC.
886 Third Avenue
New York, New York

JOHN BARRON
Falls Church, Virginia, DEFENDANTS

COMPLAINT—Filed March 31, 1975

1. Plaintiff Ilya Wolston is a citizen of the District of Columbia. On information and belief, defendant John Barron is a citizen of the State of Virginia; defendant The Reader's Digest Association, Inc., doing business as Reader's Digest Press, (hereinafter "Reader's Digest") is a corporation incorporated in the State of Delaware with its principal place of business in the State of New

York; defendant Bantam Books, Inc. (hereinafter "Bantam") is a corporation incorporated in the State of Delaware with its principal place of business in the State of New York; defendant Book-of-the-Month Club, Inc. is a corporation incorporated in the State of New York with its principal place of business in the State of Pennsylvania; and defendant Macmillan Book Clubs, Inc., is a corporation incorporated in the State of Delaware with its principal place of business in the State of New York. The matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand ($10,000) Dollars. The Court has jurisdiction over the subject matter of this action by reason of and pursuant to the provisions of 18 U.S.C. § 1332.

2. Plaintiff has for many years enjoyed an excellent reputation as a private citizen. In the 1950's he failed to comply with a subpoena requiring his appearance before a grand jury which was investigating alleged acts of espionage by certain persons, including one person who was related to plaintiff. Such subpoena was issued after a number of prior subpoenas had been issued and plaintiff had responded thereto and given testimony in connection therewith. As a consequence of plaintiff's failure to appear in response to the aforesaid subpoena, plaintiff was charged with violation of 18 U.S.C. § 401. Motivated by concern for his wife, his state of health, and a recognition that the temper of the times would have made a defense difficult if not impossible, plaintiff pleaded guilty to the aforesaid charge and received a suspended sentence thereon. Except for the aforesaid charge and plea made under the circumstances as aforesaid, plaintiff has led an unblemished and exemplary life.

3. In or about 1973, defendant Barron wrote a book entitled *KGB—The Secret Work of Soviet Secret Agents* in which plaintiffs' name appears in the index with the following language:

"Wolston, Ilya, Soviet agent in the U.S."

In said book appears the following test:

"Among Soviet agents identified in the United States were Elizabeth T. Bentley, Edward Joseph Fitzgerald, William Ludwig Ullmann, William Walter Remington, Franklin Victor Reno, Judith Coplon, Harry Gold, David Greenglass, Julius and Ethel Rosenberg, Morton Sobell, William Perl, Alfred Dean Slack, Jack Soble, *Ilya Wolston*, Alfred and Martha Stern.* (Emphasis supplied)

* No claim is made that this list is complete. It consists of Soviet agents who were convicted of espionage or falsifying information or perjury and/or contempt charges following espionage indictments or who fled to the Soviet bloc to avoid prosecution."

4. In or about January, 1974 and again in April, 1974 editions of the aforesaid book containing the aforesaid statements were published, distributed, and circulated in the District of Columbia and elsewhere throughout the United States by defendants Barron and Reader's Digest.

5. In or about July, 1974 an edition of the aforesaid book containing the aforesaid statements was published, distributed and circulated in the District of Columbia and elsewhere throughout the United States by defendants Barron, Reader's Digest and/or the Book-of-the-Month Club, Inc.

6. In or about July, 1974, an edition of the aforesaid book containing the aforesaid statements was published, distributed and circulated in the District of Columbia and elsewhere throughout the United States by defendants Barron, Reader's Digest and/or Macmillan Book Clubs, Inc.

7. In or about December 1974, another edition of the aforesaid book containing the aforesaid statements was published, distributed and circulated in the District of Columbia and elsewhere throughout the United States by defendants Barron and Bantam.

8. The aforesaid statements with respect to plaintiff were malicious, false, scandalous and defamatory libel.

9. The aforesaid statements with respect to plaintiff were published by defendants carelessly, recklessly and with wanton disregard of plaintiff's rights.

10. By reason of the aforesaid publications of said statements with respect to plaintiff, he has been deprived

of his good name, reputation, and the esteem of others; he has been held up to public scorn, contempt and disgrace; he has been greatly injured in his good name, reputation and the esteem of others; he has been held in contempt, calumny, distrust and ridicule; and he has suffered embarrasment, humilation and mental agony.

Wherefore plaintiff prays for a judgment against the defendants, and each of them, for the sum of Two Hundred Thousand ($200,000) Dollars in compensatory damages and for the sum of One Million ($1,000,000) Dollars in punitive damages.

DATED: March 31, 1975

DICKSTEIN, SHAPIRO & MORIN

By: /s/ Sidney Dickstein
A Member of the Firm
1735 New York Avenue, N.W.
Washington, D.C. 20006
(202) 785-9700

PLAINTIFF DEMANDS A TRIAL BY JURY

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. No. 75-0459

ILYA WOLSTON, PLAINTIFF

vs.

READER'S DIGEST ASSOCIATION, INC.,
d/b/a Reader's Digest Press, ET AL., DEFENDANTS

Washington, D.C.
Thursday, May 15, 1975

Deposition of

JOHN BARRON,

* * * *

[3] Q Where are you employed, Mr. Barron?
A By the Reader's Digest in Washington.
Q In what capacity?
A As a senior editor.
Q How long have you been so employed?
A I have been with the Digest since March 1965.
Q What was your initial employment, that is, the capacity of your initial employment?
A Staff Writer.
Q Would you tell us what your successive titles were during that period of time while you remained in the employ of the Reader's Digest, to date, and also indicate the date or [4] approximate dates on which these titles were changed.
A In 1966 I became an associate editor of the magazine, and in 1971 a senior editor.
Q Which position do you hold now?
A Senior editor.
Q What are the duties of a senior editor?
A They are very varied. They can range from editing copy to conceiving stories, to writing stories, to running a copy desk, being a manager.

* * * *

[23] Q Was it your idea in determining whether the book could be written, and in writing the book, to utilize original sources, as you have defined it and as I have just referred to it, wherever possible?

A Not wherever possible. We wanted to be able to cite as frequently as possible our sources, so as to enable the reader to make his or her own judgment as to the credibility of what we were saying; but at the same time, we wanted to gather from sources that were heretofore inaccessible or confidential, information too.

Q You also spoke of verification as being one of the aspects that you were considering.

A Yes.

Q Or you would consider in determining whether the book [24] could be written. What did you have in mind by that?

A We, in general, set for ourselves as a criterion or a requirement, the corroboration by at least one additional source of any data provided by another source. In other words, if we were to talk to one former KGB officer, we felt that in general we could not rely on whatever he might say, unless we could, to some considerable extent, obtain corroboration of that from another reputable source. Similarly, we could not—well—

Q What did you consider as among the reputable sources from which you would obtain corroboration?

A A government agency or an agency of any government that might have independently investigated the matters the former officer was testifying about. Another Soviet citizen who had knowledge of these matters.

Q Did you, in making the study, employ as a precept that information which derived, or which came solely from, a former KGB agent, was insufficiently reliable to incorporate in your book?

A Not always. We eventually decided that if a source had provided information, a volume of information, that we had been able to verify, that in some instances we would include [25] information that we couldn't verify from any independent source, because in our judgment he had established a credibility; but that we would so advise the reader, that that is the only source.

* * * *

[28] Q Did you and he work independently in conducting this feasibility study, or was his role in the study stage, at least, essentially one of consultation with you?

A It was more the latter. He may have done some things on his own, but he was more of a consulter and cooperater, really.

Q How did you go about making this study?

A We approached a number of foreign security and intelligence services with requests that they assist us. We at the same time began to compile a list of former Soviet nationals [29] in the West who had served in the KGB, or who had some special knowledge of it.

Q Using what sources?

A Every source we could. Open sources. Anybody we could find who could tell us about this.

Q Open sources meaning newspapers, magazines and alike?

A Yes. Correct.

Q And books published by others?

A Correct.

Q And non-open or covert sources being what?

A Sources I am really not at liberty to reveal.

Q I believe you testified you consulted with foreign security services?

A Yes.

Q Did you also consult with domestic security services?

A Yes.

Q Would that include the F.B.I and the C.I.A.?

A Yes.

Q And any other U.S. agencies?

A Yes.

Q The Department of State?

A Yes.

[30] Q Military intelligence groups?

A Yes.

Q Navy?

A I don't believe we had any dealings with the Navy.

Q Army?

A No.

Q Any organs of Congress?
A No. We obtained from various committees all their publications, but that was the extent of it, as I recall it.
Q And this was during the feasibility stage?
A We obtained some during the feasibility stage. Yes.
Q Did this feasibility study result in a written report?
A Yes.
Q That was made to Mr. Lewis?
A Yes.

* * * *

[31] Q The list that you compiled from both open and covert sources of Soviet agents, did that include the name of Ilya Wolston?
[32] A No. Let me stress, we were interested in Soviet, former Soviet, officers who had cooperated and who we thought could be useful sources.
Q And that was the makeup of the list?
A Yes.
Q Was the name Jack Soble on the list?
A No.
Q You were aware at that time that a Jack Soble had been prominently mentioned as a Soviet agent, were you not?
A Yes, but I think we are confused here by terminology. We were interested in staff officers of the KGB, or the GRU, or other bloc services; not so much spies that they had employed. The terms "agent" and "officer" I know are used interchangeably, but there is a technical difference.
Q Didn't you regard a spy that they had employed and who had thereafter started talking about his activities and the activities of others, as a source, or a potential source of the type of information you were trying to compile?
A Not necessarily; and also, you will recall I mentioned that we were interested in fresh data. The Soble case had been much in the press, and I don't think I ever paid much attention to it. Certainly, because it was so old, I was not all that [33] much interested.

Q Are you saying that it was not all that interesting during the feasibility study stage, or that it never was all that interesting?
A During the feasibility stage.
Q Was the name Boris Morros on your list of potential sources in the feasibility study?
A His book was.
Q Did you read his book during the period in which you were making this feasibility study?
A I was very familiar with his book before we began the study.
Q Was that by reason of having read it?
A Yes.

* * * *

[34] Q What judgment did you make and report to your supervisors?
A That we felt it could be done.
Q In making that decision, had you reached any conclusion as to whether you would have the cooperation of the F.B.I. in this project?
A Yes.
[35] Q What conclusion had you reached?
A That we would have some cooperation.
Q In making this decision, had you reached any conclusion as to whether you would have the cooperation of the C.I.A. in this project?
A That we would have some cooperation; yes.
Q In reaching this decision, did you reach any conclusion as to whether you would have the cooperation of the United States Defense Intelligence Agency?
A I don't think that we had consulted the D.I.A. or reached a conclusion about what might be forthcoming from them at the time of this study.
Q And what about the Intelligence Services of the Department of State? Had you consulted with them, and reached any conclusion as to whether they would cooperate?
A I think at the time we felt we might receive some minimal cooperation from the Department of State.
Q What was the basis of that belief?
A Oh, probably informal surveys as to what unclassified information might be available to anybody that asked for it.

Q What was the basis of your belief that the F.B.I. would be cooperative?

[36] A Discussions with the F.B.I.

Q Who in the F.B.I.?

A Carter DeLoach.

Q Who was then who?

A I'm always a little confused about the titles they use over there. I think his title was Assistant to the Director.

* * * *

[37] Q The subject matter that we presently focus on, Mr. Barron, was the basis upon which you concluded during the period of time in which you were conducting the feasibility study that the F.B.I. would be cooperative. You have indicated that you spoke to Carter DeLoach, and I asked you, and I repeat the [38] question, to whom else did you speak in the F.B.I. which gave you reason to believe they would be cooperative if you undertook to write this book?

A And I repeat, I had confidential conversations with a number of people with the understanding that I would not divulge their names, and I don't feel at liberty to do so now.

Q Whether I accept that, of course, is one thing. I will just let it rest at that until it is decided in a different forum. But can you confirm at least that you did speak to other people in the F.B.I. besides Carter DeLoach?

A Yes, sir.

Q Which gave you reason to believe the F.B.I. would be cooperative?

A Yes.

Q Were these people who were superior to Carter DeLoach, or below him in the F.B.I. hierarchy, or both?

A No, they were below him.

Q Without specifically identifying these people, were these agents?

A Yes.

Q What was the basis for your belief that the C.I.A. would be cooperative in this endeavor?

[39] A We had asked if we could obtain through the C.I.A. the addresses or the means to communicate with

former KGB personnel that we were interested in contacting; and eventually we were told that each request would be considered and possibly complied with.

Q Did you attempt to elicit from the C.I.A. information whether they would be cooperative in any other respect if you undertook to write the book, or were you working at the time only to supply the present addresses of KGB personnel?

A No, we wanted to make sure that the C.I.A. would not interpose any problems for us, which it easily could have done; and with no commitments from the C.I.A. on that score, we had the impression that it would not.

Q Did you have any impression as to whether the C.I.A. or C.I.A. personnel then employed, or previously employed, would be available to you in the verification process which you spoke of?

A Yes. With regard to retired C.I.A. personnel, I did know of some who agreed to take or look at certain portions of our work if it ever materialized.

Q Did you have any reason to believe you would have any access to the files of the C.I.A. for such verification [40] effort?

A No.

Q Did you have any reason to believe you would have access to the files of the C.I.A. for the collection effort?

A No.

Q I take it that the conclusion you reached after conducting this feasibility study was that there was original data in sufficient quantity and opportunity to verify that data to warrant going forward with this book. Is that accurate?

A We thought the chances of doing so were such. We were not sure.

* * * *

[43] Q In your author's preface to this book, which you have testified was accurate, you stated that Hobart Lewis authorized you to travel anywhere, to invest as much time and research as you judged necessary, and to take maximum advantage of the worldwide research resources of the Digest. When did Hobart Lewis so advise [44] you?

A In the period following my return from Mexico,

that was communicated to me and it was suggested in the cable to us.

Q The cable you received from Mr. Gilmora?

A Yes.

* * * *

Q Did you have any understanding with Mr. Lewis or the Reader's Digest generally as to who was going to pay for the travel which you would take in connection with the writing of the book?

A There was no understanding. It was just an informal understanding. It was assumed by one and all that the Digest would.

Q The advice that you could invest as much time and research as you judged necessary—was that fleshed out in any [45] way? Did you have any discussion as to approximately how much time you anticipated you would have to spend in research?

A We originally estimated that the entire process, that is, the collection of data and the writing of the book, and so on, would require about three years.

Q Did that estimate prove to be a correct one?

A No, it took longer.

Q How much longer?

A Well, more than a year longer.

Q Four-plus years?

A Yes.

Q Of those four-plus years, could you approximate what percentage of that amount was spent on research, as distinguished from writing material that you had compiled through such research?

A Bearing in mind it is only an estimate, I would say approximately 50 to 55 percent in research and the remainder in writing. You see, we were writing portions of it as we went along, so there was no clear demarcation.

Q What were the world-wide research sources of the Reader's Digest as they existed during the period of time in which you were conducting your research on this program?

A We have—as we publish in thirteen languages and [46] have offices in a number of countries, these offices

provided research resources. We have additionally in Paris a magnificent research office. We have in New York an equally magnificent one.

Q When you say "magnificent," would you describe what that encompasses?

A Well, with regard to Paris and New York, the staffs consist of professional researchers. In Paris, linguists who have a capability of collecting and translating and evaluating all sorts of data. And you also have access to the normal sources that journalists tend to have.

Q What was the size of the research staff in New York?

A Where?

Q In New York City. You said New York. I assume you meant New York City. Is it New York City you are referring to?

A Yes. Yes. I really don't know. We probably have as many as twenty people, but that is just an estimate.

Q Did you consider that all of those twenty people were available to you in accordance with Mr. Lewis's instructions and advice?

A Oh, no. I wouldn't need all twenty of them, but I [47] did consider that they had the capacity to retrieve data from the press, from the library resources of the city, and from other reference work, and to conduct interviews, if necessary.

Q Did Mr. Lewis impose any limitation on the number of researchers you could employ, or the amount of hours of their time you could utilize in connection with this project?

A No.

Q What was the size of the research staff in Paris?

A Oh, I think our staff over there, again, would number maybe fifteen to eighteen people, including the editors.

Q Did Mr. Lewis impose any limitations either with respect to the number of people or the amount of time that you could utilize in connection with this project?

A No.

Q You had carte blanche as far as New York and Paris were concerned?

A Yes, I did, within reason, or practical reason.

Q What were the other research facilities, or research resources, available to the Reader's Digest, and hence available to you, in connection with this book?

A As I have stated, the offices of our various foreign editions were all available.

[48] Q Do you have a Berlin office?

A No.

Q Do you have any office in Germany?

A Yes.

Q Where is that?

A Stuttgart.

Q Are there researchers in that office?

A Yes.

Q Approximately how many during this period of time?

A I really don't know. These are foreign companies and I'm not all that familiar with the composition of the staff.

Q Did you ever have occasion to use your Stuttgart office for research or verification in connection with the preparation of this book?

A I think we did consult with them on several occasions.

Q Do you recall any consultation with them with regard to the subject matter of Ilya Wolston?

A No, there was none.

Q Do you recall any consultation with your Paris office with regard to the subject matter of Ilya Wolston?

A There was none.

[49] Q Do you recall any consultation with your New York researchers with respect to the subject matter of Ilya Wolston?

A The New York research office very well may have produced some of the newspaper clippings in our files pertaining to Mr. Wolston. We have some clippings, but material was flowing in from so many sources that I can't say that these particular clips came from New York. They might have been gathered here.

* * * *

Do you have any knowledge that there were newspaper [50] clippings in your research material pertaining to Iyla Wolston?

A We have some now. When we got them, I don't know. I may have misled the counsel in that he asked me what documents I relied upon, and that is the document that I relied upon solely.

Q You are pointing to Document 114, "Exposé of Soviet Espionage, May 1960"?

A That is correct. I had, in addition, as I said, read the Boris Morros book, and I may have read the newspaper clippings, but I don't know, because we didn't rely upon anything but the Senate Document.

* * * *

Q It is your best recollection, as you have just testified, that you relied exclusively on this Senate Document and, therefore, whether you had clippings before or after would not have any bearing upon the content of your book insofar as it refers to Ilya Wolston?

A That is correct, but I did not want to be misleading. [51] I read volumes of material and I very well may have read some of these references during the many nights that I read. I just don't know. But insofar as what we relied upon and what is stated in the book, it is the Senate Document before you.

Q On Page 188 of Plaintiff's Exhibit 1 and on Page 255 of Plaintiff's Exhibit 2 appears the name Ilya Wolston in conjunction with the names of Elizabeth T. Bentley, William Remington, Judith Coplon, Harry Gold, Julius and Ethel Rosenberg, Morton Sobell, and Jack Soble, and others, prefaced by the phrase, "Among Soviet agents identified in the United States."

Now, is it your testimony that the sole source of information upon which you based your identification of Ilya Wolston as being among the Soviet agents was this Senate Report?

A That is correct.

* * * *

THE WITNESS: Well, I say I had read the Boris Morros book, which identifies Mr. Wolston as a Soviet

agent in numerous pages. But for the purposes of documentation, it was the Senate Report on which we relied.
[52] MR. DICKSTEIN: When you say you read the Boris Morros book, you mean you read the entire book?
THE WITNESS: Yes.

* * * *

[59] Q Did you make any attempt whatever to verify any of the information which is set forth at Page 26 of Plaintiff's Exhibit 3 with regard to Ilya Wolston?
A No.
Q You were aware on a reading of Plaintiff's Exhibit 3, were you not, that the information with respect to Ilya Wolston that was reported here had come from Jack Soble?
A I was aware that some of it had.
Q Were you aware that there was any other source for any information concerning Ilya Wolston?
A Yes.
Q What other source?
A The F.B.I. The investigation of the F.B.I. which resulted in a report to the State Department in 1951 of black marketeering and probable espionage activities by Mr. Wolston that culminated in his dismissal from the State Department.
Q Did you make any effort to determine whether Mr. Wolston had been, in fact, dismissed from the State Department?
A We accepted the truth of the official F.B.I. and the Senate Document.
[60] Q The document to which you refer, and I am quoting in part, says:

"Information concerning the probable identification of Wolston as a Soviet agent was furnished to the Department of State in 1951, together with data developed concerning his black market activities in Germany. The Department of State, on the basis of these data, dismissed Wolston from his employment in Berlin."

Is that what you are referring to?
A Yes, sir.

* * * *

[61] A Do you want me to explain why we did not contact Mr. Wolston?
Q Yes.
A I guess there were several reasons. Mr. Wolston had refused to testify under command about the very matters we would be interested in questioning him about.
Q Excuse me, before you leave that. Where did you learn that?
[62] A From the statement. He refused to testify about espionage matters arising out of Grand Jury indictments.
Q The statement, I believe, said that Wolston was sentenced for contempt, for failure to appear before a Federal Grand Jury in July 1958. The sentence was suspended and he was placed on three years' probation, conditioned on his being available to process of the District Court within the three-year period.
A But that Grand Jury was investigating espionage matters.
Q Did you ascertain, or did you have any information as to whether Mr. Wolston had testified prior to the occasion of that Grand Jury subpoena?
A Subsequent. At the time of the writing, no. Subsequently, yes.
Q What did you do in your subsequent check?
A We found—I found, upon a rereading of the newspaper clipping, remarks to the effect that Mr. Wolston had testified prior to the time Jack Soble reversed his position and admitted his role in espionage. I found that subsequent to this reversal by Soviet Agent Soble, Mr. Wolston refused to testify.
[63] Q And you garnered this from newspaper clippings?
A Yes.

* * * *

A We additionally noted the statements imputed to people who knew Soble, I mean, knew Mr. Wolston, that he had a history of mental instability; and we were uncertain as to what reliability could be placed in such a witness.

Q When did you initially note this?

A In Boris Morros' book. There was subsequent confirmation of it in statements which were imputed to you, Mr. Dickstein.

Q The newspaper clippings that you obtained concerning Ilya Wolston, which you were uncertain as to whether or not you had them contemporaneous with your writing of the book—

A Yes.

Q —is there any reason why those clippings, if [64] obtained after you wrote the book, could not have been obtained prior to the time you wrote the book, or prior to the time the book was published?

A No, but there would be no reason to. They are certainly of a lesser source than the official Government document insofar as our research standards are concerned.

Q Again you are referring to Senate Document 114?

A That is correct.

Q When you decided to undertake to write this work, it was not your concept, was it, that you would simply take government documents and compile the information which existed in previously published sources?

A It was our desire, when we were talking about United States citizens, to rely upon sources that we could cite and defend. Yes. We certainly didn't intend to write the book solely from Government documents, as I had made clear.

Q As a matter of fact, you yourself, I believe, established that there were two criteria in determining whether or not this book would be feasible: The first was whether there would be original data which you defined as information which had not been previously published; and the second was whether data generally could be verified. Have I correctly paraphrased [65] your statement?

A Yes, but incompletely.

Q Would you complete it for us, please?

A Yes. We felt that, of course, you have to flesh out any work to make it believable. You have to refer people to matters that are a part of the public record. In this particular section we are using matters that are part

of the public record to illustrate a broader and, I think, more original theme.

Q Certainly you will agree, will you not, that this publication on which you rely, which on its face shows it was published in 1960, was information which was previously available to the public. Is that correct?

A Yes.

* * * *

Q Did you consider—and I am not asking a legal question now, but I am asking a literary question, if you would—did you consider that it was unnecessary to attempt verification of information concerning an individual which would have [66] appeared in some Government document?

A In this case I considered it unnecessary, yes.

Q Why was that?

A Because this was a considered formal statement by the F.B.I. bearing the imprimatur and passive endorsement of a constituted committee of the Senate, responsible for internal security matters; and our experience has been that statements of the F.B.I. issued under such circumstances are reliable and legally defensible.

Q Let us talk about their reliability and leave aside and leave to the lawyers the question of whether they are legally defensible. What was your experience which gave you reason to believe that statements published by the F.B.I. under such circumstances were reliable?

A My whole dealings as a journalist over the years with the F.B.I. have shown that the information they have imparted to me has been reliable.

Q What were those dealings, and what information did they impart to you which gave you this impression that the information they disseminated about individuals was reliable?

A You have asked two questions. My dealings as a newspaper reporter were very extensive over a number of years, [67] covering many subjects—civil rights, crimes, kidnapings—and the F.B.I. always told me the truth; and as far as the statement, what the F.B.I. said there was consistent with what was known from other sources.

Q You are talking about Boris Morros now?

A Yes. Well, I was speaking of the general F.B.I. report.

Q Was it your belief, then, in writing this book, that if the F.B.I. made a statement concerning someone, that you could accept it as gospel and not bother to verify, or attempt to verify, the truth or accuracy of that information?

A If the statement was made formally in writing and disseminated by a committee of the Senate, we considered it reliable. Yes.

* * * *

Q When you wrote this book and decided what would require or what would not require independent verification, were you concerned with trying to immunize the text from a lawsuit [68] such as this for libel, or were you concerned with an effort to be as reliable as it was possible to be?

A Well, both, but I think if you want really a responsive answer, I am afraid we are confusing two issues here. When we are speaking about original data, that is, emanating from one man in contradistinction to an institution, the requirements for verification there are much higher than a statement emanating from a duly constituted committee and from a respected agency of the Government.

Q The work, Document 114, Plaintiff's Exhibit 3, refers to information concerning the probable identification of Wolston as a Soviet agent being furnished by the Department of State. Did you attribute any significance to the word "probable" in this respect?

A I would have had the identification—if the identification of Wolston as a Soviet agent had not been made more categorically and specifically in later paragraphs and had not been made elsewhere.

Q What are the later paragraphs to which you refer?

A I was referring to a point in time. In other words, in one paragraph which appears after an earlier paragraph, we have a reference to a probable identification in 1951.

[69] Q Yes.

A But prior to that, in the second paragraph of the section under discussion, we have a statement that Jack Soble specifically identified Mr. Wolston as a Soviet agent.

Q Any other source? Does any other source appear in this document as the basis for so identifying Mr. Wolston?

A There are references elsewhere in the document to Wolston.

Q I realize there is another reference on Page 24, the prefatory statement that begins to describe the so-called Jack Soble case. Is that what you are referring to?

A Yes. I think there is also in the table of contents another reference to Mr. Wolston.

Q In the totality of this work, aside from the statement as to the probable identification of Wolston as a Soviet agent, which was furnished to the Department of State in 1951, according to this, is there any other information pertaining to Wolston which describes or suggests a source other than Jack Soble?

A I don't know what the source of this statement is, Mr. Dickstein.

Q What statement?

[70] A "In addition, the FBI investigation resulted in identifying as Soviet intelligence agents, Jane and George Zlatovski, who were indicted on July 8, 1957, charged with espionage conspiracy; Alfred and Martha Stern, who were indicted on September 9, 1957, on two counts charging espionage conspiracy; Ilya Wolston, who was charged with contempt for failing to appear before a grand jury and on August 7, 1958, pleaded guilty in the Southern District of New York."

I don't know what the basis of the F.B.I. statement there is.

Q Isn't that expanded upon on Page 26, the information given?

A I don't know whether we can call that an expansion at all. It is entirely possible they had still other information. I have to rely upon what they categorically say, though.

Q When you read this information about Ilya Wolston, you read it in its totality, didn't you? You didn't rely on just one sentence and one phrase on one page? You did rely on everything in the report, didn't you?

A Yes.

Q And if there was information in one portion of this [71] report which amplified upon and extended upon and delineated other information, you considered that as a part of the totality of the information, didn't you?

A Yes, but I don't consider Jack Soble is the sole source of the F.B.I.'s categorical characterization of Ilya Wolston as a Soviet agent.

Q From the content of Page 26 and 27, does there appear to be any source other than Jack Soble?

A Yes.

Q Tell us what that is.

A Well, before, years before, Jack Soble told the United States Government anything, the F.B.I. had information which it considered of sufficient importance that it transmitted it to the State Department, to the effect that probably Wolston was a Soviet agent. That is my construction of that. I interpreted it—

Q Where does it say here that the F.B.I. obtained and transmitted that information to the Department of State?

A Information concerning the probable identification of Wolston as a Soviet agent was furnished to the Department of State in 1951, together with data developed concerning his black market activities in Germany.

Q Does that sentence indicate what the source of that information was, or who the transmitter of that information [72] was, or are you just assuming it was the F.B.I.?

A It does not indicate the source. Obviously, the F.B.I. processed the information. Whether it developed it is not clear, but it is clear the information did not emanate from Jack Soble.

Q That is because of the 1951 dating?

A That's right.

Q When you wrote your book and referred to Ilya Wolston did you give any consideration to identifying

Wolston not as a Soviet agent, but as one who had been probably identified as a Soviet agent?

A No, because he is categorically identified and it would have been misleading to state that.

Q Categorically identified in the other portion of this text?

A Yes, sir.

Q What did you then consider to be Jack Soble's reputation for truth, reliability and veracity?

A I think the information that Jack Soble provided the Government after his ideological defection, or his change of mind, or his decision to cooperate, was extremely useful and [73] proved to be quite reliable in many cases.

Q You said that one of the words that you relied on and considered in connection with your reference to Ilya Wolston was the Boris Morros book. Were you aware of what Boros Morros' view was of Soble's reliability?

A Yes, but I think we are speaking about, in a sense, two different people here—the Jack Soble as a Soviet agent and still under Soviet discipline, who was a professional agent, dissembling by nature and not necessarily immorally in his scheme of ethics as an agent, and then the Jack Soble who for reasons of his own decided to tell what he knew to the United States Government.

Q Were you also aware that Mr. Morros had no information whatever concerning Mr. Wolston other than that which Mr. Soble had provided him with?

A I am not aware of that at all. My impression from the book is that the only source Boris Morros cites is Jack Soble. What else he knew, I do not know.

* * * *

[74] Q To what extent did Katharine Clark assist you in the research and preparation of the book?

A To an enormous extent.

Q Approximately what portion of her time was spent on the book?

A All her time, or almost all. The time spent on other endeavors would have been minuscule.

Q Over the four-plus years in which you were working on it?

A Yes.

Q Do you know whether she ever had anything to do with the collection of information pertaining to Ilya Wolston?

A Yes. Other than the forwarding to me of this Senate Document to which we have often referred, she had nothing to do with the information pertaining to Ilya Wolston.

[77] Q Did you have any knowledge as to what had become of Ilya Wolston after 1968?

A No.

Q Did you ever make any effort to obtain the official court papers dealing with the Ilya Wolston contempt proceeding?

A No.

Q You were aware, were you not, that there were such official court papers?

A I wasn't sure whether they were still extant or not.

Q Did you have any reason to believe that the Government would destroy court records on cases?

A No, but I am just unfamiliar with how long court records are kept, or how accessible they are.

Q Did you ever ask anybody on the Reader's Digest Research Staff to ascertain whether those records still existed?

A No, we felt we had sufficient documentation.

Q Did you ever have occasion to speak to Herbert Kantor, a former Assistant U.S. Attorney, with respect to any content of the book?

A No. Not to my recollection. I have never—I am unfamiliar with the name.

* * * *

PLAINTIFF'S EXHIBIT NO. 1

K G B

THE SECRET WORK OF SOVIET SECRET AGENTS

BY

JOHN BARRON

[SEAL]

READER'S DIGEST PRESS

Distributed by E. P. Dutton & Co., Inc.
New York
1974

It counts heavily upon spies to discern weaknesses in political resolve and military preparedness that Soviet policy can exploit. And while espionage is but one activity of the KGB, it remains the one activity that consumes most of the time of KGB officers abroad and the one most frequently exposed to public view.

Even in 1962, when Khrushchev offered assurances that the Soviet Union did not intend to spy on anyone, the evidence of worldwide Soviet espionage abounded in public records. It had been provided as early as the 1930s by prominent Soviet defectors such as General Alexander Orlov, author of a basic Soviet espionage manual, and by Walter Krivitsky, who tried in vain to warn of high-level penetrations in Western societies. In September 1945 cipher clerk Igor Gouzenko fled the Soviet embassy in Ottawa with the first revelations that the Soviet Union had stolen the secrets of the atomic bomb while engaging in massive scientific and industrial espionage against its wartime allies. Subsequently, royal commissions in Canada and Australia, and official investigations in Great Britain and the United States, demonstrated that Soviet spies had thoroughly infiltrated Western governments, scientific institutions, and intellectual circles.

Among Soviet agents identified in the United States were Elizabeth T. Bentley, Edward Joseph Fitzgerald, William Ludwig Ullmann, William Walter Remington, Franklin Victor Reno, Judith Coplon, Harry Gold, David Greenglass, Julius and Ethel Rosenberg, Morton Sobell, William Perl, Alfred Dean Slack, Jack Soble, Ilya Wolston, Alfred and Martha Stern.* Important agents exposed in Great Britain included the nuclear physicists Klaus Fuchs and Alan Nunn May; the diplomats Guy Burgess and Donald Maclean; and Harold A. R. Philby, a senior British intelligent officer. In 1960 the Senate Internal Security Subcommittee listed thirty-seven proven cases of Soviet espionage against the United States uncovered in the 1950s. And beginning in 1961, Khrushchev, far from curtailing Soviet espionage, intensified it. Each succeeding year has yielded new examples of Soviet attempts to steal the scientific, industrial, military, and political secrets of other nations.

* * * *

CHAPTER IX

Khrushchev quotation: *Soviet Intelligence and Security Services, 1964-1970*, S SSIS, 1972, p. 1.

Early Soviet espionage: Orlov, *Handbook of Intelligence and Guerrilla Warfare*; Krivitsky, *I Was Stalin's Agent; The Report of the Royal Commission*, Ottawa, February 5, 1946; Gouzenko, *The Iron Curtain; The Report of the Royal Commission on Espionage*, Sydney, August 22, 1955.

Soviet agents in U.S.: *Exposé of Soviet Espionage (Prepared by the FBI)*, R SSIS 1960.

Soviet agents in Great Britain: West, *The New Meaning of Treason*; Wise and Ross, pp. 101-103, 113-115.

Drummond: Washington *Evening Star*, September 29, 1962; New York *Times*, September 30, 1962; Washington *Post*, August 16, 1963; interviews with U.S. Department of Defense.

Wennerström: Whiteside, *An Agent in Place*; Washington *Post*, November 30, 1964, and October 7, 1972; *The Wennerstroem Spy Case*, SSIS, 1964.

Solomatin: *The Times* (London), *Daily Express* (London), *Daily Telegraph* (London), March 26, 1964.

Bytchkov and Poluchkin: Montreal *Gazette* and Ottawa *Journal*, May 10, 1965.

Whalen: New York *Times*, July 13, 1966; interview with FBI.

Rinaldi: Washington *Sunday Star*, April 9, 1967; Western security services.

Eitzenberger: *Stuttgarter Nachrichten* (Stuttgart), June 23, 1970; Western security services.

Odantara: *Asahi Evening News* (Tokyo), *Japan Times*, May 14, 1969.

Ryabov and Mamontov: *La Prensa* (Buenos Aires), November 6, 1970; Washington *Evening Star*, November 11, 1970.

Volokov: *Le Figaro* (Paris), May 4, 1973; Western security services.

Makarov and Lobanov: *Berlingske Tidende* (Copenhagen), March 28-30, 1972; Western security services.

Yerofeyev: New York *Times*, April 29, 1973.

* * * *

Wolston, Ilya, Soviet agent in U.S., 188

* * * *

* No claim is made that this list is complete. It consists of Soviet agents who were convicted of espionage or falsifying information or perjury and/or contempt charges following espionage indictments, or who fled to the Soviet bloc to avoid prosecution. The conviction of Judith Coplon was set aside on a legal technicality. However, in ruling that she was entitled to a new trial, Judge Learned Hand stated her guilt was plain. Ultimately, the government dropped the charges because it could not disclose information obtained by wiretap. It might also be noted that Whittaker Chambers, a former *Time* magazine editor who confessed that he had been a Soviet agent, repeatedly charged that Alger Hiss was one of his fellow conspirators. Hiss, who served as an adviser to President Roosevelt at Yalta and later became director of the Office of Special Political Affairs in the State Department, always denied Chambers' allegations. However, Hiss was convicted of perjury on the basis of some of his denials and sentenced to five years' imprisonment.

PLAINTIFF'S EXHIBIT No. 2

BORRIS MORROS

MY TEN YEARS AS A COUNTERSPY

1959

NEW YORK: THE VIKING PRESS

* * * *

On November 3, 1953, I told Jack I was leaving for Europe next day. He came over that afternoon with a copy of the State Department's latest letter about his passport, which he wanted passed on to Korotkov. Though Myra was continuing to insist he give me no more letters to deliver to Korotkov, he wrote another now at my urging.

This was on three sheets of hotel stationery and was written in German in pencil. It was another demonstration of Jack's impressive talent for saying the same things in different words. This one said a mutual friend, Dr. Slanzer, had received a position in one of our best clinics. He was now the leading doctor in one of its departments. To achieve this, he had passed the state examinations after seven and a half months of preparations and trials. Family members were getting along nicely, and some of them might visit Europe in the spring and look up the recipient.

After reading this aloud to me, Jack translated it. "Dr. Slanzer" was Slava, "clinic" the War Department; "seven and a half months of trials and preparations" meant that the State Department had, after much deliberation, finally cleared Slava for work in Europe; "family members" meant Slava and other members of Jack's group.

* * * *

We walked down Sixth Avenue to Tom's Place, a bar that did not look too crowded. There we sat at a table and ordered a drink. One thing quickly became obvious.

Jack intended to keep on stalling, no matter what the consequences. He had alibis galore for not complying with the instructions. In spite of myself, I had to admire how logical and sensible he made these sound.

He was unable to introduce me to Slava because Slava's wife refused to permit such a thing. I must remember that Slava was an important man now. The poor man had been in trouble with the Federal authorities back in 1946 when it was discovered that he had accepted $500 from Chaliapin, our ring's agent in San Francisco —not only accepted the money, but signed a receipt for it! But recently, after a great deal of hard work, Slava had obtained clearance to move to a post in Europe. Mrs. Slava did not wish him to do anything to cause the clearance to be withdrawn. In just two months, if the transfer came through, he would be moving on to a post either in Paris or in Bonn, Germany. He would sail for Europe, if the transfer came through in time, between June 15 and June 30. That would enable Slava to meet me, or any other secret agent designated, in either Paris or Berlin early in July.

Before I had a chance to object to the "ifs" conditioning all this, Jack began to sing the praises of the mysterious Slava. "Slava is tall, handsome, blond, a native-born American, and only thirty-six years old! A linguist too! I'll let you know the moment his transfer comes through," said Jack. "Meanwhile, we'll arrange the details of the rendezvous and parol. If Berlin is the meeting place, Slava will be there in front of the Amfro Hotel at eight p.m. * * *

"They know all about Slava in Moscow," was all I could get him to say. "They ought to remember when Slava gave Chaliapin a whole satchel full of papers back in nineteen forty-five, when the United Nations was formed. And how can they forget his services to them in Alaska and at Cologne?"

He wrote another letter—a ten-page affair—reiterating everything that he had written previously, about his need for money, his passport troubles, and the splendid work his Canadian contacts were doing for him. About the only progress I made was learning that Slava was

his nephew, the son of a sister who had recently died. In the letter Jack stated that this nephew's name was Ilya (not Elliott!) Folston. He also said Wolston had not come to Europe because he had been driven to the verge of insanity by his mother's death. But he was now recovering from his grief, and would leave for Europe very soon.

That defecting might prove the luckiest thing Soble ever did was a thought that occurred to me when I reached Vienna again in October 1954. The first two times I called the usual number—U-47306—there was no answer. The third time a man answered whose voice I did not recognize. He arranged a rendezvous for the following day when I identified myself as "Riabov." But when we met he was so aggressive I suspected that the NKVD had been taken over lock, stock, and barrel by the military.

"You are alone?" he asked, without bothering to identify himself. "I thought you would be with Soble. Or at least with the other one, 'S' " (meaning Slava).

When I tried to explain, he said, "You'd better go on to Moscow. They want to see you there." I pleaded, as usual, that I had too much pressing business to attend to, but that I would be happy to meet Korotkov in Vienna, whenever he could manage a trip to Austria.

* * * *

I next said, "By the way, Jack once told me that you aksed him for money to pay a lawyer who helped you get your passport."

"That makes no sense at all," said Albam, but quite calmly. He quickly explained that he had applied for a passport a few years before. Hearing nothing from the State Department, he had written a letter to Washington and had been informed that the matter was still being investigated.

"It is true that I did consult a lawyer," he said, "and he advised me that my application was probably in the hands of the FBI, but that this was the usual procedure."

Unlike the other espionage agents, Albam was a placid soul. "I am not going to travel abroad, so I need no passport. When I do, the government will probably give

me one." Then he added, and again without rancor, "I cannot understand what has happened to Jack. Why should I make up a story like that about asking for money to pay my lawyer?"

"When I saw Soble in Toronto a few days ago," I said, "he talked a good deal about Ilusha Wolston, his nephew, being dangerously ill with grief over his mother's death."

Albam shook his head. "Jack should turn novelist," he said, "if he is going to tell stories like that. Wolston has been insane for several years, certainly long before his mother's death. Unless I am mistaken, he is too ill mentally to realize his mother is dead. He is a physical wreck, a psychotic who more than occasionally goes beserk. He is also a recluse and lives on a farm most of the time. As though that were not enough, recently I was told by a doctor that he had cancer."

When I questioned Albam about this doctor, he explained that he was Soble's brother, hence Wolston's uncle.

I told Albam that his first assignment from me would be to get Slava's telephone number and address, as well as an up-to-date report on his mental and physical condition.

* * * *

And while this book was being written two events occurred which may prove significant in the FBI's continuing fight against the entire Soviet espionage apparatus in this country. One was the grotesque attempt of Jack Soble to commit suicide by eating a large quantity of nuts and bolts in the machine shop of Lewisburg Penitentiary. As he knew at the time he was about to be taken back to New York to appear before a Federal Grand Jury there I can only assume he was trying to escape giving testimony against former Comrades. I strongly suspect that these are members of other Russian spy rings here whose existence he never revealed to me.

The other was the arrest and indictment for perjury of Mark Zborowski, the man Soble had asked Moscow to get out of the country before he "tell all he knows." A fifty-year-old research assistant in anthropology at

Harvard, Zborowski was accused by the government of lying when he denied before a Federal Grand Jury in New York that he had met Soble between 1944 and 1947. During those three years the Justice Department charged that the pair had more than fifty meetings. As this book was going to press, Zbrowoski's bail, originally set at $20,000, had been reduced to $2500 and his trial was indefinitely postponed. Not long afterward Ilya Wolston, Jack Soble's mysterious "Slava," was given a one-year suspended sentence for contempt of court. He had failed to respond to six subpoenas issued by a Federal Grand Jury in New York. Wolston pleaded guilty but gave mental illness as his excuse.

I know nothing of the activities of these two men except what Soble, a confirmed liar, told me.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-459

ILYA WOLSTON, PLAINTIFF,

vs.

READER'S DIGEST ASSOCIATION, INC.,
DOING BUSINESS AS READER'S DIGEST PRESS, ET AL.,
DEFENDANTS

Washington, D.C.
Wednesday, December 10th, 1975

Deposition of:

ILYA WOLSTON,

* * * *

[5] Q When were you born?
A On May the 10th, 1918.
Q And in what country?
A In Russia.

* * * *

[7] Q When did you first meet Jack Soble?
A In my early childhood.
Q Are you related to Jack Soble?
A Yes.
Q What relationship is he to you?
A He is my late mother's brother, so that that makes him my uncle.

* * * *

[10] When, to your knowledge, did Jack Soble travel to the United States for the first time?
A Okay. The whole group, which Jack Soble arranged to come to the United States—not arranged to come to the United States, but to obtain Soviet exit visas. They arrived in 1941.
Q When you say "they," can you be more specific? Was it that whole family that you listed before?
A About ten people, to the best of my recollection, roughly speaking, I think it engulfed the people.

Q Can you name any of those people?
A My mother—the ones that I am sure of are my mother, my sister, Jack Soble, Myra Soble—

* * * *

[56] Q You are aware, I assume, of the Grand Jury proceedings that took place in the Southern District of New York in the years 1957 and 1958 to investigate acts of espionage or alleged acts of espionage by Soviet agents in the United States?
A I am.
Q When were you first aware that Federal agents or investigators were interested in obtaining information from [57] you and from your wife with respect to the espionage investigation?
A On the day that Jack Soble and Myra Soble were arrested.

* * * *

[59] Q Was Jack Soble finally indicted after his arrest?
A Yes.
Q What was he indicted for?
A For espionage. I believe he confessed.
Q Were any other of your family indicted for any crimes by that Grand Jury sitting in the Southern District?
A His wife Myra.
Q Anyone in your immediate family in terms of blood?
A No. No, she was not blood. No. No. No. No.
Q But, to your knowledge, were other persons indicted for espionage by that Grand Jury sitting in the Southern District?
A My uncle's wife, Dina. I guess that is it.
Q Did Jack and Myra Soble eventually plead guilty to committing espionage?
A I think so. I believe, yes.

* * * *

[60] Q Did you on July 1st, 1958, fail to appear in response to a subpoena served to you by a Grand Jury sitting in the Southern District of New York?

A I don't know whether it was July 1st, but I did fail to appear in response to one subpoena after appearing on four or five occasions, I believe.
Q Was there a contempt motion filed by the government on the basis of your failure to appear?
A Yes.
Q Did you plead guilty—
A Yes.
Q —to criminal contempt—
A Yes.
Q —with regard to that motion?
A Yes.
[61] Q Was that in August of 1958?
A Possibly.
Q Were you sentenced as a result of that plea?
A One year suspended; three year probation.

* * * *

[74] Q I am adding, Mr. Wolston, a book entitled "My Ten Years as a Counterspy" by Boris Morros. This document has already been included and is part of the deposition of the plaintiff. It was Plaintiff's Exhibit No. 4, and I think in order to avoid confusion I would like to continue to refer to it as Plaintiff's Exhibit No. 4 if that is all right with counsel.
MR. DICKSTEIN: By all means.

BY MR. HAMILTON:

Q Why don't you take some time to take a look at the book, Mr. Wolston?
A I am familiar with this book.
Q You are familiar with it?
A (Nodding head affirmatively).

* * * *

[77] Q Do you know of your own recollection now, without reviewing the book—
A Yes.
Q —what statements are in the book concerning your name?
A In one place Morros says that Soble told him that Slava was Ilya Wolson, his nephew.

Q And, to your knowledge, when he was referring to Slava, what person was he describing?

A I don't know. According to the book the inference is that that was a code name for me.

Q And a code name in what respect? A code name for what [78] kind of association?

A As being a member of his ring.

Q And his ring is what kind of ring?

A Espionage!

Q Do you know with any more specificity what other comments were made about you in this book other than the reference to Ilya Wolston as Slava?

A A reference that impressed me most is the concluding comment by Morros that anything that he has stated about Ilya Wolston or Slava he learned from Jack Soble, a confirmed liar.

Q You are reading from the book now, is that correct?

A No, I am not. I am not reading. I know it by heart.

Q Are there any other comments about you in the book that you recall of your own knowledge without referring to the book?

A (Witness closes book).

I think that somewhere in the book Morros says that Soble told him that I had risen in my position and had become a very important man.

* * * *

[79] Q When you became familiar with the comments about you in this book to the extent that you generally knew them as described to you just now, what were your reactions to those statements?

MR. DICKSTEIN: What did he do or what were his mental reactions?

MR. HAMILTON: No. 1, what were his mental reactions, [80] yes.

THE WITNESS: My mental reaction was that my hatred and despising of Jack Soble increased manifold for having brought upon me and upon other members of the family such unbelievable disgrace. And also the extent to which he went in fabricating this whole mess.

BY MR. HAMILTON:

Q So your state of mind was that you were angry at Soble, is that correct?

A Extremely.

Q You were distraught, is that correct?

A Yes, to put it mildly.

Q But to take the second half of the question posed by counsel, did you take any action on the basis of having learned of these statements about you in the book?

A No.

Q You took absolutely no action whatsover?

A No.

Q You never wrote the publisher of the book?

A No.

Q You never filed a libel suit?

A No.

* * * *

[82] MR. HAMILTON: Okay. We are back on the record.

I would like to move from the Morros book to another document which was also introduced as Exhibit No. 2 in the deposition of John Barron, and that is a Senate report entitled "Exposé of Soviet Espionage, May 1960."

* * * *

[87] Q Have you, since you have become aware of this document?

A Yes.

Q —written the FBI or the Senate Judiciary Committee or made any contact with either of those government agencies with respect to this report—

A No.

Q —or with respect to the statements made about you in the report?

A No, sir.

Q Have you issued any kind of a public denial of those statements—

A No, sir.

Q —if you feel they are false?

* * * *

[103] Q Now we are only interested in this lawsuit presumably and what, if any, effect Mr. Barron's statements have been.

A I understand that. Okay.

I would have to put it this way then: that I consider the book by Mr. Barron an extension of everything that happened since '57, the end result.

* * * *

[107] Q Do you feel that the author, John Barron, bears any animosity towards you—

A No.

Q —as an individual?

A No.

Q Do you feel that when he wrote the statements in the [108] book that he did about you that he felt he was making false statements?

A I don't think so. I think he was somewhat—that he took a lot of things too much granted without going to the people.

Q But it is not your contention that he knew that he was making false statements about you and, nonetheless, went forward with them?

A Knowing about the Morros book and about the whole thing I believe that he should not have called me what he called me.

* * * *

DEFENDANTS' EXHIBITS 2-16

N.Y. Times July 15, 1958

SPY INQUIRY HUNTS NEPHEW OF SOBLE

Contempt Action Threatened for Failure to Heed Grand Jury Summons Here

A search is on for Ilya Wolston, a nephew of the confessed Soviet spy Jack Soble, for failing to appear before a grand jury investigating espionage.

Federal Judge Edward J. Dimock signed an order yesterday afternoon calling upon Wolston to show cause on July 28 why he should not be held in contempt for ignoring a subpoena.

The order was requested by Assistant United States Attorney Herbert C. Kantor of the criminal division. It was sent by special messenger to the United States Marshal's office in Washington, where Wolston has a home at 4884 MacArthur Boulevard. However, his whereabouts are unknown. Soble is serving a seven-year prison sentence in Lewisburg, Pa.

Mr. Kantor said the Government had taken great care to make sure that Wolston had in fact received the subpoena in question.

"We checked and rechecked the circumstances, and we know that he was served the subpoena by a deputy marshal and that therefore he had full knowledge of a command to appear to give evidence," Mr. Kantor said.

The 40-year-old native of Lithuania did testify on three occasions before an espionage grand jury in February and March of last year.

When Wolston testified in 1957, Soble had just been arrested. The latter and his wife, Myra, confessed in April and pleaded guilty to transmitting defense secrets.

Wolston entered this country in 1939 and was naturalized four years later. He had been in contact with the Sobles in Europe and the United States for a long time before the Sobles were arrested by the Federal

Bureau of Investigation after a ten-year study of the espionage situation, according to Mr. Kantor.

Wolston is sought now to testify about an alleged "general criminal conspiracy against the United States," it was said.

Wolston was inducted into the United States Army on April 20, 1942, and assigned to a military intelligence training center at Camp Ritchie, Md. He served variously as an interpreter and was discharged from the Army in 1946.

Wolston was said to have married a Polish woman named Christina in Europe ten years ago.

N.Y. Journal American July 15, 1958

SOBLE NEPHEW FACING JAIL IN SPY QUIZ SNUB

The Lithunian-born nephew of convicted Soviet spy Jack Soble faced a possible jail sentence for contempt today for ignoring a subpoena ordering his appearance before a U.S. grand jury probing espionage.

Ilya Wolston, 40, Washington, was given to July 28 to show cause why he shouldn't be penalized for failure to appear July 1 as ordered. He apparently disappeared June 30.

Asst. U.S. Atty Herbert C .Kantor told Federal Judge Edward J. Dimock yesterday that Wolston's whereabouts were unknown. He said the missing man could give the grand jury "valuable information."

Born in the same village as his uncle, Wolston came to the U.S. in 1939, was naturalized in 1943, inducted into the Army and was assigned to military intelligence.

Wolston served as a liaison interpreter between American and Russian pilots in Alaska until 1945 when he went to San Francisco as an interpreter for the American delegation at the UN conference. He later worked for the American Military Government.

N.Y. Times July 29, 1958

CONTEMPT IS LAID TO NEPHEW OF SPY

Ilya Wolston, a nephew of the confessed Soviet spy Jack Soble, was in Federal court yesterday charged with contempt for failure to appear before a grand jury investigating espionage.

Wolston, a 40-year-old native of Lithuania, spent most of his time in court a picture of dejection, either sitting in the back or standing before Judge John M. Cashin. He was described by his attorney, Sidney Dickstein, as being on the verge of suicide.

Herbert C. Kantor, Assistant United States Attorney, told the court that Wolston had ignored five subpoenas since early last year and had showered his office with letters from physicians, telephoned excuses and visits from his wife.

Mr. Dickstein made one move to save his client. The grand jury that had indicted the Sobels and had tried to get Wolston to testify was present in the courtroom. It was suggested that it take advantage of Wolston's presence, but the move was promptly rejected. The jurors were on hand to be dismissed after working through seventy sessions in the last eighteen months.

York Herald Tribune July 15, 1958

U.S. CONTEMPT WRIT FACING KIN OF SOBLE

The Federal government moved yesterday to have a nephew of Jack Soble, confessed Soviet spy, punished for contempt on the grounds that he failed to appear on July 1 before a special Federal grand jury investigating espionage.

Assistant United States Attorney Herbert C. Kantor obtained from Judge Edward J. Dimock in United States District Court an order directing Ilya Wolston, a Lithunaian-born former Army interpreter of Russian, to show cause why he should not be cited for contempt

for failing to comply with a subpoena demanding his appearance. The show cause order directed Wolston to appear on July 28.

Mr. Kantor said that Wolston appeared before the jury three times in February and March, 1957, but failed to show when called again.

Efforts to reach Wolston at his home in Washington, D.C., were of no avail, it was reported, and his whereabouts are unknown. Mr. Kantor said that Wolston and Soble, who is now serving a seven-year sentence for heading a Soviet spy ring, were in contact for a long period before Soble's arrest in January, 1957.

New York Mirror July 15, 1958

HUNT SOBLE KIN FOR SPY DATA

The Federal government began a search yesterday for a Lithuanian-born nephew of convicted Soviet spy Jack Soble who failed to appear before a special Federal grand jury in the U.S. Court House here.

Assistant U.S. Attorney Herbert Kantor obtained an order from Federal Judge Dimock calling on Ilya Wolston, 40, whose last known address was 4884 MacArthur Blvd., Washington, to show cause July 28 why he should not be punished for contempt.

Wolston, whose whereabouts now are unknown, had been served with a subpeona to appear for questioning here July 1. Kantor disclosed that Wolston, naturalized in 1943, made three appearances before the spy grand jury in February and March-1957.

KANTOR SAID Wolston had been in contact with his uncle, Soble, in Europe and the U.S. for a long period before Soble's arrest in January 1957. Soble now is serving a seven-year term in Lewisberg, Pa., for admittedly heading a spy ring which funneled government secrets to Russia.

Wolston, Kantor said, was wanted to testify about an alleged violation of the U.S. code dealing with a "general criminal conspiracy against the U.S.," Kantor added:

"It is believed he has information which would be material to the inquiry currently being conducted by the spy grand jury."

Wolston was inducted in the U.S. Army April 20, 1942, and assigned to the military intelligence training center at Camp Ritchie, Md. Later he served in Alaska as liaison interpreter between Russian pilots and the Army Transport Command, then supplying military planes to Russia. Still later he was a liaison interpreter for the military government in Germany and in the office of the U.S. High Commissioner of Germany.

Washington Evening Star July 15, 1958

COURT CALLS SPY'S NEPHEW

Ilya Wolston, 40, of the 4800 block of MacArthur boulevard N.W., nephew of convicted spy Jack Soble, has been ordered to appear in a New York Federal Court on July 28 to show cause why he should not be cited for contempt of a grand jury.

The action, the Government said, was based on Wolston's failure to appear July 1 before a special Federal grand jury investigating espionage.

Federal Judge Edward J. Dimock signed an order yesterday calling on Wolston to appear on July 28 for ignoring a subpoena to appear before the jury.

Assistant United States Attorney Herbert C. Kantor, who requested the contempt writ told Judge Dimock it is believed Wolston has information which would be material to the inquiry that is currently being conducted by the spy grand jury. Wolston, a Luthuanian-born former U.S. Army interpreter of Russian, appeared before the jury in February and March in 1957.

Soble, also Lithuanian-born, is serving a seven-year sentence in the Lewisberg, Pa., Federal prison for heading a spy ring that sent vital government secrets to the Soviet Union. His wife, Myra, also was jailed for spying.

New York Herald Tribune August 14, 1958

SOBLE'S NEPHEW SENTENCED

A one-year suspended sentence was imposed yesterday on Ilya Wolston, nephew of the convicted spy Jack Soble, by Judge John Cashin in United States District Court. Wolston was sentenced for contempt of court and failure to appear before a grand jury investigating espionage.

Wolston's sentence also included three years probation. The suspended sentence was conditioned on his appearing before another grand jury investigating espionage if one is established.

New York Daily News 14 Aug. 1958

SETS SOBLE KIN FREE . . . IF HE'LL TALK ON SPIES

A one-year suspended sentence was imposed yesterday in Federal Court on Ilya Wolston, 40, nephew of confessed Soviet spy Jack Soble, for contempt of court in failing to appear before a grand jury probing espionage.

Judge John Cashin also put Wolston on three years probation, conditional on his testifying before another spy panel when and if it is established. "I say to you, sir, that any failure will be a violation of probation," Cashin said.

A New Jury Possible

Cashin said he had been informed by the U.S. attorney's office that another grand jury may be impaneled. However, U.S. Attorney Arthur Christy refused to comment.

Wolston, a former Army intelligence specialist and liason man with Russian occupation forces in Germany, pleaded guilty at a hearing last week. In all, Wolston, who lives in Washington, failed to answer six grand jury subpoenas, every time claiming mental illness.

N.Y. News 8 Aug. 1958

SOBLE KIN ADMITS HE SNUBBED SPY PROBE

Ilya Wolston, 40, nephew of confessed Soviet spy Jack Soble, abruptly pleaded guilty yesterday to failing to comply with a federal court order to appear before a grand jury investigating espionage.

Wolston's surprise move came in Federal Court before Judge John Cashin after a 40-minute recess during which Wolston conferred with his attorney, Sidney Dickstein, and with Cashin. The judge set 2 P.M. next Wednesday for sentencing.

The recess was called when Wolston's wife, Mrs. Christine Wolston, broke down and wept while describing how she cared for her husband after he got electric shock therapy for the illness which prevented him from appearing before the grand jury.

Faced Contempt Charge

The testimony was given during a hearing on a government order directing Wolston to show cause why he should not be held in contempt for failing to honor grand jury subpenas.

Preceding Mrs. Wolston on the stand, Assistant U.S. Attorney Herbert Kantor described how Wolston had appeared before the grand jury twice, in January and February 1957, before the arrest of Soble and his wife, Myra, but how since the arrest, he had spurned six subpenas, pleading illness and providing doctors' certificates.

N.Y. Tribune 29 July, 1958

JUDGE REJECTS OFFER TO TESTIFY BY SOBLE NEPHEW

Judge John Cashin rejected yesterday in United States District Court an offer by Ilya Wolston, Lithuanian nephew of Jack Soble, convicted spy, to testify before a grand jury investigating espionage in order to purge himself of possible contempt of court.

In reserving decision on whether Wolston was in contempt, Judge Cashin said that "there is no question in my mind that there was a studied attempt to avoid appearance before this grand jury." He set Thursday for a hearing on the matter and dismissed the grand jury, which completed yesterday its statutory term of eighteen months.

Wolston's attorney, Sidney Dickstein, pleaded that his client did not appear before the grand jury because he was "a sick man with suicidal tendencies." Herbert Kantor, Assistant United States Attorney, said that Wolston failed to appear in answer to five different subpoenas, every time submitting a doctor's certificate the day before his scheduled appearance.

Wash. Post & Times Herald 16 July 1958

KIN OF SOBLE FACES QUIZ ON CONTEMPT

Ilya Wolston, of 4884 MacArthur blvd., a nephew of convicted Soviet spy Jack Soble, faces Federal contempt proceedings for his failure to appear July 1 before a grand jury in New York investigating espionage.

The United States Marshal's office here had an order yesterday for service on Wolston directing him to show cause why he should not be cited for contempt. The order was issued in New York by Federal Judge Edward J. Dimock and sent here by special messenger.

Reached at home, Wolston denied knowledge of either the July 1 subpoena or the "show-cause" order. He would not comment further.

Neighbors said Wolston, 40, is a quiet, friendly man who moved into the MacArthur blvd. apartment a year ago. He lives with his wife, Christine.

Assistant United States Attorney Herbert C. Kantor, of New York, said today before Wolston's scheduled testimony, a lawyer phoned his office and said Wolston was too ill to appear. Kanton said Wolston has not contacted the office since.

Wolston, born in the same Lithuanian village as Soble, appeared before the grand jury in February and March, 1957. Kantor said he is believed to have information material to the spy inquiry.

Soble is serving a seven-year term in Federal prison in Lewisburg, Pa. Wolston, according to Kantor, was in frequent contact with Soble.

N.Y. News 15 July 1958

SOBLE NEPHEW FACES RAP FOR PROBE DODGE

By NORMA ABRAMS

A Lithuanian-born nephew of convicted Soviet spy Jack Soble—Ilya Wolston, 40, of 4884 MacArthur Blvd., Washington, D.C.—faced a federal crackdown yesterday for ignoring a subpena ordering him to appear July 1 before the special U.S. grand jury here which has been investigating espionage.

At 4:15 P.M., on request of Assistant U.S. Attorney Herbert C. Kantor, Federal Judge Edward J. Dimock issued an order directing Wolston to show cause July 28 why he should not be punished for contempt.

A special messenger took a copy of the order to the U.S. marshal in Washington for service on Wolston, who had testified before the grand jury in February and March, 1957.

Soble currently is serving a seven-year term in Lewisburg, Pa., Federal Prison for heading a spy ring here. Wolston, according to Kantor, was in frequent contact with Soble both in the U.S. and in Europe before Soble's arrest in January, 1957.

A Lawyer Called

June 30, an attorney who said he was acting on behalf of Wolston, phoned the U.S. attorney's office and said Wolston might not be able to show on July 1 because of illness. He did not show—and obviously authorities are not pleased with his failure to contact them later.

Born in the same Lithuanian village as his uncle, Wolston came to the U.S. in 1939, was inducted into the Army on April 20, 1942, and was assigned to the military intelligence training center at Camp Ritchie, Md. He became a U.S. citizen by naturalization in 1943.

As a soldier, Wolston was a liaison interpreter between Americans and Russian pilots in Alaska from October, 1943, to June, 1945. He later served as an interpreter between the American crew which flew the Russian delegation to the UN conference in San Francisco in June, 1945, and the delegation. He was honorably discharged from the Army in January, 1946.

N.Y. Times Aug. 14, 1958

NEPHEW OF SOBLE PUT ON PROBATION

Ilya Wolston, a nephew of Jack Soble, convicted Soviet spy received a one-year sentence yesterday for contempt of court and failure to appear before a Federal grand jury investigating espionage. The sentence was suspended.

Judge John M. Cashin placed Wolston on probation for three years. He ordered that Wolston must appear before another espionage grand jury if it is established, or serve the one-year jail term.

Wolston, a former Army intelligence specialist and liaison man with the Soviet occupation forces in Germany, pleaded guilty to the contempt charge.

The New York Times, August 8, 1958

NEPHEW OF SOBLE ADMITS CONTEMPT

Ilya Wolston, a nephew of confessed Soviet spy Jack Soble, interrupted a contempt of court hearing yesterday to plead guilty.

Wolston, 40-year-old native of Lithuania, was charged with contempt after he had failed on three occasions to testify before a Federal grand jury investigating espionage.

The defendant and his wife, Mrs. Christine Wolston, had appeared before the grand jury on three occasions prior to Soble's pleading guilty. Wolston failed to honor three subpoenas after the guilty plea. Soble is serving a seven-year sentence.

Wolston contended that he had been unable to appear before the grand jury because he was suffering from a mental illness. In yesterday's hearing Mrs. Wolston was the defendant's first and only witness. She broke down during cross examination by Herbert C. Kantor, assistant United States Attorney. A recess was called and a short while later Wolston pleaded guilty.

Federal Judge John M. Cashin will sentence Wolston Wednesday. Under Federal rules the term of sentence is entirely within the discretion of the judge.

New York Daily News, July 29, 1958

SPY NEPHEW'S PLEA TOO LATE, COURT DECIDES

Federal Judge John Cashin yesterday rejected a last-minute offer by Ilya Wolston, 40, nephew of confessed Soviet spy Jack Soble, to testify before a grand jury investigating espionage and thus clear himself of a possible contempt of court rap.

The judge set a hearing on the contempt motion for Thursday and dismissed the grand jury, which completed its 18-month term yesterday.

Assistant U.S. Attorney Herbert Kantor told the court that Wolston appeared before the grand jury twice, in January and February, 1957, before the arrest of Soble and his wife, Myra.

Made Medical Plea

But since their arrest, Kantor said, Wolston failed to appear on five different occasions, each time submitting a doctor's certificate on the day before his scheduled appearance.

Judge Cashin said there was "no question in my mind that there was a studied attempt to avoid an appearance before this grand jury."

The Sobles were indicted by the same grand jury and pleaded guilty in April, 1957. Since then they have been cooperating with the government in uncovering espionage. Soble is serving a 7½-year sentence and his wife a 5-year-term.

"Suicidal Tendencies"

Wolston's attorney, Sidney Dickstein, asserted that his Lithuanian-born client did not go before the grand jury because he was "a sick man with suicidal tendencies," and asked that he be heard yesterday.

Wolston came to the U.S. in 1939 and was inducted into the Army in 1942. Kantor said that Wolston was in frequent contact with Soble both in the U.S. and Europe before Soble's arrest as head of a spy ring.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-459

ILYA WOLSTON, PLAINTIFF,

v.

READER'S DIGEST ASSOCIATION, INC., doing business as READER'S DIGEST PRESS, ET AL., DEFENDANTS.

District of Columbia) ss.

AFFIDAVIT OF JOHN BARRON

I, JOHN BARRON, being duly sworn, depose and say as follows:

1. I am a Senior Editor in The Reader's Digest Association, where I have been employed since 1965. From 1957 to 1965, I was a reporter for the *Washington Evening Star* newspaper.

2. During my career in journalism I have received numerous honors and awards, including the George Polk Memorial Award for national reporting; the Raymond Clapper Award for the most outstanding Washington correspondence in 1964; The Washington Newspaper Guild Grand Award of 1965 and the Newspaper Guild Front Page Award for investigative reporting. Additionally, I have received an award from the American Political Science Association for "distinguished reporting of public affairs."

3. From 1969 through 1972 I devoted full time to researching and writing the book *KGB: The Secret Work of Soviet Secret Agents* (hereinafter "*KGB*"), which was published by The Reader's Digest Press in 1974. After the final text of *KGB* was written, professional researchers, under my direction, reviewed each line to ensure that it accurately reflected and could be sustained by the research data accumulated during preparation of the book. To allow readers to assess the

accuracy of the work, I, with the assistance of the researchers, compiled extensive Chapter Notes citing the sources of each substantive passage of the book. On the basis of my research and the verification process described above, I was confident upon publication of *KGB* that the book as a whole and each and every statement in it were true, and I was aware of no fact that tended to make me doubt the truth of the book or of any statement in it.

4. In the course of researching and writing *KGB*, I obtained a copy of the Report entitled "Expose of Soviet Espionage, May 1960" (hereinafter "FBI Report"), which was prepared by the Federal Bureau of Investigation and published on July 2, 1960 by the Internal Security Subcommittee of the Senate Judiciary Committee. A copy of the FBI Report is included as an attachment to this Affidavit. On page 24 of the FBI Report the individual Ilya Wolston is identified as a Soviet intelligence agent. The FBI Report also states on pages 26 and 27 that Jack Soble furnished information in 1957 identifying Ilya Wolston as a Soviet agent and that information concerning the probable identification of Ilya Wolston as a Soviet agent was furnished to the State Department in 1951. After reviewing the FBI Report, I relied upon it as documentation for the statement in Chapter IX of *KGB* that Ilya Wolston was among those identified as Soviet agents in the United States, and I cited this Report in the "Chapter Notes" accompanying Chapter IX of *KGB*. At no time have I been aware of any fact that would give me reason to doubt the truth of the FBI Report or any statement in it.

/s/ John Barron
JOHN BARRON

District of Columbia, ss:

Subscribed and sworn to before me this 5th day of April, 1976.

/s/ Harolin W. Mills
Notary Public

86th CONGRESS *2d Session* SENATE No. 114 DOCUMENT

EXPOSE OF SOVIET ESPIONAGE MAY 1960

PREPARED BY THE

FEDERAL BUREAU OF INVESTIGATION
UNITED STATES DEPARTMENT OF JUSTICE

J. EDGAR HOOVER, *Director*

TRANSMITTED BY DIRECTION OF

THE ATTORNEY GENERAL

FOR USE OF THE

SUBCOMMITTEE TO INVESTIGATE THE ADMINISTRATION OF THE INTERNAL SECURITY ACT AND OTHER INTERNAL SECURITY LAWS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
EIGHTY-SIXTH CONGRESS
SECOND SESSION

[SEAL]

JULY 2, 1960.—Ordered to be printed

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J. G. SOURWINE, *Counsel*
BENJAMIN MANDEL, *Director of Research*

S. Res. 345

IN THE SENATE OF THE UNITED STATES,

July 2, 1960.

Resolved, That there be printed as a Senate document a summary of known Soviet espionage cases in the United States over the past fifteen years, published by the Internal Security Subcommittee of the Committee on the Judiciary of the Senate and heretofore printed as a committee print under the title "Exposé of Soviet Espionage".

SEC. 2. There shall be printed an additional thirteen thousand copies of such document for use of the Senate Committee on the Judiciary.

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SOVIET-BLOC INTELLIGENCE ACTIVITIES

1. *INTRODUCTION*:

Recent Soviet propaganda has denounced the United States for aerial reconnaissance of the Soviet Union in terms designed to convince the world that the USSR would not stoop to espionage. In discussing this subject and the reception which President Eisenhower might expect on his visit to Russia, Premier Khrushchev was quoted in the newspapers on May 11, 1960, as wondering what would have been the reaction of the American people if the Russians had sent a plane over the United States on the eve of his visit to this country.

The facts are that at the very time Premier Khrushchev was advancing to the podium to speak before the United Nations General Assembly on September 18, 1959, two Soviet espionage agents were cautiously surveying a street corner in Springfield, Massachusetts, in preparation for a clandestine meeting with an American whom they were attempting to subvert. At the very time that Khrushchev was declaring that a means must be found to stop mankind from backsliding into an abyss of war, Vadim A. Kirilyuk, Soviet employee of the United Nations, was attempting to induce this American to furnish information regarding United States cryptographic machines and to secure employment in a vital United States Government agency where he could obtain classified information for the Russians. While this meeting was taking place Kirilyuk and the American were under observation by Leonid A. Kovalev, another Soviet employee of the United Nations who was conducting a countersurveillance. Unknown to the Russians, however, this meeting was also being observed by Special Agents of the FBI who obtained photographs of the Russians.

Not only did these Russians stoop to spying, but they callously abused their status as guests of this country to spy in the most reprehensible manner—the subversion of an American on American soil.

Although FBI Agents observed the meeting and photographed the Russians, no publicity was given to this incident in view of the negotiations which were then in progress. This incident, as contrasted with the recent

handling of the plane incident by the Russians, gives ample testimony as to which country is acting in good faith in trying to maintain world peace.

And this is not an isolated incident—nor has the target always been so limited. The facts are that Soviet agents for three decades have engaged in extensive espionage against this country, and through the years have procured a volume of information which would stagger the imagination. This information includes literally dozens of aerial photographs of major U.S. cities and vital areas which have given the Russians the product of aerial reconnaissance just as surely as if Soviet planes had been sent over this country.

2. *ACQUISITION OF AERIAL PHOTOGRAPHS*:

In a free country such things as aerial photographs are available to the public and can be purchased commercially. The Soviets have been fully aware of this and throughout the years have taken full advantage of this free information, collecting aerial photographs of many areas of the United States.

For example, during October, 1953, two Soviet officials visited Minneapolis where they purchased fifteen aerial photographs of Minneapolis and St. Paul. In October and November, 1953 two Soviets traveled in Missouri and Texas and the surrounding areas covering a Naval air station, an Army airfield, and an Air Force base. In April, 1954, a Soviet official purchased aerial photographs of five Long Island communities. Also, in April, 1954, a Soviet official purchased three aerial photographs of Boston, Massachusetts, and Newport, Rhode Island, areas. In May, 1954, three Soviets traveled to California where they ordered from a Los Angeles photography shop $80 worth of aerial photographs covering the Los Angeles area.

However, they have not been content with acquisition of publicly available data. For example, on May 3, 1954, Leonid E. Pivnev, as assistant Soviet air attache stationed in Washington, who had previously traveled extensively throughout the United States and had obtained commercially available aerial photographs of various areas of this country, requested a Washington, D.C., photographer to rent an airplane to take photographs of New York City which were not commercially available. He specified the scale to be used and the altitude from which the photographs were to be taken. He offered $700 for this activity. Obviously the photographs which he requested would depict vital port areas, industrial facilities, and military installations in the New York area.

For this brazen abuse of his diplomatic privileges Pivnev was declared persona non grata on May 29, 1954, and deported from this country on June 6, 1954.

But this did not stop the Soviets. They continued their systematic program of collecting aerial photographs of major cities and vital areas of the United States. On January 19, 1955, the State Department sent a note to the Soviet Ambassador placing restrictions on the acquisition of certain types of data by Soviet citizens in the United States. These restrictions were comparable to restrictions on American citizens in Russia and in part prohibited Soviet citizens from obtaining aerial photographs except where they "appear in or are appendices to newspapers, periodicals, technical journals, atlases and books commercially available to the general public."

Soviet reaction to the restrictions was typical of their philosophy. They began circumventing the restrictions by subverting Americans to purchase aerial photographs for them. One month after the restrictions became effective, Nikolai I. Trofimov, a Soviet official in Mexico, began negotiations for a resident of the west coast of the United States to obtain aerial photographs of 45 major United States cities. Nineteen of these cities are located near Strategic Air Command bases. The remaining 26 are all strategic cities in or near which are located air bases, naval bases, research or training stations, atomic energy installations or important industrial facilities.

During April, 1958, Vladimir D. Loginov, a Soviet employee of the United Nations used the same technique to obtain an aerial map of New York City. At 10 p.m. on April 26, 1958, Loginov secretly met an individual in

a darkened parking lot at the railroad station in Scarsdale, New York, where this map was delivered to Loginov. Months later on November 15, 1968, this same parking lot was again utilized by the Soviets to obtain aerial photographs of Chicago, Illinois. On this occasion, the photographs were turned over to Kirill S. Doronkin, another Soviet employee of the United Nations. In this same operation, the Soviets attempted to obtain aerial photographs of Portland, Oregon; Seattle, Washington; and San Diego and San Francisco, California.

Circumvention of the restrictions also took the form of trickery and deceit. For example, on July 17, 1959, Viktor V. Fomin, assistant Soviet military attache in Washington, D.C. obtained an aerial photograph of the Glasgow Air Force Base in Montana from the local Chamber of Commerce by posing as tourists without identifying themeselves as Soviet officials. On July 24, 1959, they obtained an aerial photograph of Thermopolis, Wyoming, by bullying the clerk at the Chamber of Commerce in an arrogant and insistent manner again posing as tourists. They were given the photograph in spite of the fact that such a photograph is not normally given to tourists.

It is apparent from the examples cited that the Soviet Union reaps the benefits of aerial reconnaissance of the United States just as surely as if planes were sent over this country.

3. *RECRUITMENT OF AMERICANS*:

The acquisition of aerial photographs is only one phase of Soviet-bloc intelligence activity in the United States, but the manner in which it has been done illustrates two basic Soviet intelligence concepts; namely, to exploit the weakness of Americans whenever possible and to take full advantage of all the freedoms of our democratic society.

Following these concepts, the Soviets through the use of such devices as entrapment, blackmail, threats, and promises have exploited human frailty. The record is replete with examples of such exploitation of Americans throughout the years following the Russian Revolution

in 1917. For example, Nicholas Dozenberg, a naturalized American, first became associated with the communist movement about 1920. In 1928 he was recruited into Soviet espionage activities with the approval of the Communist Party. He was recruited by one Alfred Tilton, who was an illegal agent of Soviet Military Intelligence, posing as a Canadian citizen and in possession of a Canadian passport. One of the early assignments given to Dozenberg was the sounding out of other Americans for later recruitment by Tilton. Dozenberg, after pleading guilty to violations of the passport laws, served a term in prison in 1940 and thereafter prior to his death cooperated with United States Government agencies.

Simon Rosenberg, another naturalized American of Polish background, during 1931 was sent to Russia by his employer. While there, he met representatives of a Soviet intelligence agency and under threats of reprisals to be taken against his sister who was then living in Russia, he agreed to work in behalf of the Russians upon his return to the United States. His principal assignment in this country was to obtain technical and industrial information. Rosenberg, who is now deceased, also cooperated with agencies of the Government, prior to his death, as have many other Americans who have been involved in Soviet intelligence activity.

Another example is the case of Hafis Salich, a naturalized American employed by the Office of Naval Intelligence in California who met Mikhail N. Gorin through a mutual acquaintance in 1937. Gorin was then the Pacific Coast manager of Intourist. By advancing Salich money, Gorin ultimately persuaded him to furnish Office of Naval Intelligence reports for which Gorin paid $1700. Gorin and Salich were found guilty of espionage in 1939 and Salich was sentenced to four years imprisonment, which he served. Gorin appealed his conviction and sentence of six years to the Supreme Court of the United States which unanimously upheld the conviction in 1941; however, the trial judge suspended execution of the sentence and placed him on probation provided he would pay a $10,000 fine and leave the United States, never to return.

The decade of 1950-1960 has been no exception. It began with the trial and conviction of Valentin Gubitchev, a Soviet employee of the United Nations who had obtained information from Judith Coplon, an employee of the Department of Justice. This conviction was soon followed by convictions of several Soviet agents in the Julius and Ethel Rosenberg network in 1951; by the sentencing of Otto Verber and Kurt Ponger in 1953 after they pleaded guilty to espionage; by the guilty pleas of espionage by Jack and Myra Soble and Jacob Albam in 1957 and later in the same year the conviction of Colonel Rudolf Abel, a Soviet illegal agent in this country.

These prosecutions, although they clearly establish the nature of Soviet espionage activities against this country, involve only a part of the Soviet-bloc espionage attack which has included numerous Soviet attempts to penetrate United States Government agencies. For example, the prosecution of Judith Coplon, an employee of the Department of Justice in early 1950 was followed in October, 1950, by a Soviet assignment to Boris Morros, an American motion picture producer who was cooperating with the FBI, to revive his acquaintance with a member of the United States Atomic Energy Commission; to obtain compromising information concerning this individual; and to carefully explore the possibility of placing a secretary in his office who could furnish information to the Russians. Morros previously in 1948 had been given the assignment to attempt to obtain information which could be used by the Russians in an effort to compromise United States General Clay in Germany.

Another example occurred during 1954 when Soviet intelligence officers in Germany approached an American Army officer stationed in Germany who was soon to be retired. They propositioned him to work for the Soviets after his return to the United States and set up a schedule for meetings in New York City. Pursuant to the arrangements, Maksim G. Martynov, counselor of the Soviet Representation to the United Nations Military Staff Committee, carried out a series of clandestine meetings in New York with a person whom he believed to be the

Army officer. As a result of his abuse of his status, Martynov was declared persona non grata on February 21, 1955.

Another example is that of Evgeniy A. Zaostrovtsev, second secretary of the Soviet Embassy who was declared persona non grata on May 13, 1959, for attempting to subvert a State Department employee to obtain information from State Department files.

A more recent example has been previously cited involving the attempt by Vadim Kirilyuk, an employee of the United Nations, to penetrate a vital Government agency by instructing an American to obtain employment in that agency.

Soviet attempts to recruit Americans during this period have not been confined to attempts to infiltrate Government agencies. For example, in February, 1954, Igor A. Amosov, assistant Soviet naval attache, was declared persona non grata for attempting to obtain information concerning radar and United States naval vessels from a businessman who had commercial dealings with the Russians and who was in a position to obtain such data.

In June, 1956, Ivan A. Bubchikov, an assistant Soviet military attache was declared persona non grata for attempting to obtain data regarding radar, guided missiles, jet fuels and atomic submarines from an American businessman who during World War II had extensive contacts with the Russians on both private and United States Government business. The Soviets attempted to exploit his World War II friendliness.

In August, 1956, Viktor I. Petrov, a Soviet translator at the United Nations, was released from his employment for recruiting an employee of an American aviation company to obtain classified data regarding United States aircraft.

4. *THE INTELLIGENCE ROLE OF THE SOVIET-BLOC OFFICIALS*

Only a few of the many examples of abuse of their diplomatic privileges by Soviet-bloc officials in the United States have been mentioned. In the more flagrant cases, the United States Government has asked the offending

officials to leave this country. During the decade, 1950-1960, 19 Soviet officials have been asked to leave. Many more have been engaged in intelligence activities throughout the years.

The Soviet Union has maintained a large staff of officials in this country since its first recognition in 1933. These officials have been assigned to Soviet embassies, consulates, trade delegations, news media, the United Nations, and the Amtorg Trading Corporation. It is from these installations that the primary intelligence activities are directed against the United States. A former Soviet intelligence officer who defected from the Soviets has estimated that from 70% to 80% of the Soviet officials in the United States have some type of intelligence assignment. Other defectors have confirmed that a high per cent of the officials are intelligence agents. As of May 1, 1960, there were 328 Soviet officials stationed in this country. They were accompanied by 455 dependents, many of whom are also potential intelligence agents.

Nor is this the full strength of Soviet-bloc intelligence. As of May 1, 1960, there were 272 satellite officials station in the United States accompanied by 435 dependents. This almost doubles the potential of Soviet intelligence services. The satellite intelligence services have been developed according to the Soviet pattern, their personnel selected or approved by the Soviets and they are trained and guided by Soviet policies and procedures. Recent defectors from satellite intelligence services have advised that the Soviets have access to all data obtained by the satellites and, in fact, maintain an advisor system at headquarters level to make certain that the satellites operate consistent with Soviet interests.

This coordination is not limited to headquarters' levels. Beginning in November, 1958, the Soviet and satellite miltary, naval and air attaches stationed in the United States began a series of monthly meetings under the guidance of the Soviet military attache. During this initial meeting the satellite representatives were given specific target assignments for the collection of information desired by the Soviets and arrangements were made for the over-all correlation of their activities.

5. *INDUSTRIAL SPYING AND CIRCUMVENTION OF REGULATIONS*:

This large group of Soviet-bloc officials stationed in the United States has systematically over the years developed a most important part of the modern intelligence machine which was referred to by one Soviet official as the best industrial spying system in the world. Volumes could be written as to the techniques used and the ways and means developed by the Soviet bloc to obtain information regarding the industrial potential of the United States often with the use of subterfuge and deceit as well as deliberate circumvention of Customs regulations.

The following examples illustrate this activity:

In 1924 the Amtorg Trading Corporation was organized in New York for the purpose of acting as an importer and exporter on the North American continent for official trusts of the Soviet Union. Amtorg continued to operate during World War II, although in 1942 the Soviet Government created the Soviet Government Purchasing Commission in Washington, D.C., to purchase war material. This Purchasing Commission was dissolved after the end of World War II, and its activities absorbed by Amtorg. Since its organization, Amtorg Trading Corporation has been staffed primarily by representatives of the Soviet Government who have official status. Former employees of Amtorg have advised that it was standard practice for Soviets attached to Amtorg to request permission for Soviet officials to vist industrial facilities throughout the country on the promise of orders to be forthcoming if the products were found satisfactory. In many instances the officials of the companies would later be advised by Amtorg that Moscow would have to approve the order. In instances where a contract was given to a particular company, Amtorg consistently demanded blueprints of the particular product and other data to which it was not entitled by normal business practices. Amtorg officials also consistently insisted on a clause in the contract which would give Soviet inspectors the privilege of inspecting all of the merchandise before it was shipped to Russia.

Another device utilized by Amtorg officials was to gain the confidence of some employee in a plant which had a contract with the Russian Government and, through this employee, obtain blueprints which were copied in the Amtorg office and the copies forwarded to Russia. Amtorg officials would also advertise for employees who, when they appeared for an interview at the Amtorg office, would be instructed to bring proof of their ability in the form of blueprints of former projects. When the applicants for employment later showed up with the blueprints, the blueprints would be photographed and the photographs forwarded to Russia.

Amtorg has also followed a practice of preparing detailed catalogues concerning American industry. Congressman Mundt on January 29, 1947, described one of these catalogues as "a manual for bombing America." It was pointed out that the book contained detailed information including many photographs and maps of vital areas of the United States. In this connection Amtorg Trading Corporation during the 1940's prepared a monthly magazine called "American Engineering and Industry" and an annual guide called "Catalogus of American Engineering and Industry." This latter publication in 1946 was described as a three-volume, 5,000-page document.

In August, 1956, Milos Prochazka, a Czechloslovakian official assigned to the Commercial Office at the Czech Embassy, furnished to an American the specifications for the components of 2 steel mills to be purchased in the United States for the Czechs. He outlined a plan whereby the American would act as an exclusive agent to purchase these mills ostensibly for a private concern in a Western country. He would obtain estimates and if the estimates were approved, the Czechs would furnish the name of the purchasing company, a power of attorney and the necessary bank credit. Thereafter, the mills would be shipped to the Czech agent in the Western country and then transhipped to Czechoslovakia.

6. *EXPLOITATION OF PUBLIC INFORMATION*:

It is no secret that one of the results of the freedom of our democratic society is the availability of voluminous

information to members of the public merely for the asking. Some of the cases previously cited clearly indicate that the Soviet-bloc intelligence services are aware of this fact and have taken full advantage of this democratic freedom; however, it remains for former Soviet-bloc intelligence officers to testify as to its real significance and importance to the Soviet-bloc intelligence services. One defector has stated that the ease with which information is obtained in this country has resulted in a reduction of the hazardous and time-consuming clandestine operations which would otherwise be necessary. Another has estimated that the Soviet Military Attache's office in the United States is able to legally obtain 95% of the material useful for its intelligence objectives. He stated that, in fact, 90% of an intelligence agent's time in any other country in the world would normally be consumed clandestinely obtaining information which is readily available in the United States through Government agencies or commercial publishing houses. He pointed out that Polish military intelligence obtains more technical data in the United States than from all the other countries in the world combined.

Although such information is collected in a number of ways, the following techniques in addition to those previously mentioned have been most productive.

One of the most useful techniques is attendance at conventions of American organizations by Soviet-bloc officials. During the year preceding Khrushchev's visit to this country, Soviet officials alone attended approximately 30 conventions covering various fields of endeavor including aeronautics, electronics, plastics development, education and others. Typical were the activities of 2 Soviets who attended the Western Electric convention held in Los Angeles during August, 1959. As usual, at the inception, they began to collect voluminous literature. When the volume became unwieldy one Soviet left the material at a check stand and resumed his collection activities. It was estimated that the literature picked up by these Soviets at this one convention weighed approximately 250 pounds.

Another technique utilized is correspondence with chambers of commerce and industrial facilities throughout the

United States through which voluminous information regarding transportation systems, major industries, etc., is obtained. In many instances useful maps of the areas are also secured.

Still another technique is the subscription to American publications and collection and review of United States Government documents. For example, during June, 1959, it was ascertained that the personnel of the Soviet Military, Naval and Air Attache Offices subscribed to 44 newspapers and 58 magazines of a technical, scientific, military and general news nature. It is apparent that the Soviets have a definite program of subscribing to newspapers published at or in the vicinity of vital United States military bases.

Purchases from the United States Government have long been a productive source for Soviet-bloc intelligence. For example, on December 28, 1944, the Soviet Government Purchasing Commission in Washington, D.C., ordered copies of 5,810 patents. On the same date the New York office of this Commission purchased two copies of 18,000 patents. On January 1, 1945, the Soviet Government Purchasing Commission in Washington again ordered copies of 5,342 different patents. On January 12, 1945, copies of 41,812 patents were ordered, The next order was for 41,810. The acquisition of copies of patents has been continued throughout the years as illustrated by the fact that in early 1959 Anatoli G. Vasilev, an employee of the Office of the Soviet Military Attache, requested an American to instruct him in the use of the "Search Room" of the United States Patent Office so that he could locate patents in which he was interested.

The Soviets have, of course, not restricted themselves to the acquisition of patents. For example, on March 10, 1954, an Assistant Soviet Air Attache purchased "The Pilot's Handbook" for the East and West Coasts of the United States from the United States Coast and Geodetic Survey of the Department of Commerce. On March 12, 1954, a chauffeur of the Soviet Air Attache purchased "The Pilot's Handbook" for Canada and Alaska. Six days later an Assistant Soviet Attache ordered "The Pilot's Handbook" for the Far East and

Europe. These handbooks contained diagrams of all of the principal airfields and the approaches used in landing planes.

In April, 1954, Soviet officials stationed in Washington obtained from the Map Information Office of the U.S. Geological Survey, Department of the Interior, topographic maps covering North Carolina, Michigan, Illinois, Kentucky, and an area within a 50-mile radius of Washington, D.C.

This collection activity has continued unabated up to the present time. Literally thousands of similar documents are obtained in this country every year by Soviet-bloc officials assigned in this country and through registered agents such as the Four Continent Book Corporation and the Tass News Agency.

A statement of a satellite defector illustrates the value to the Soviet-bloc of United States Government publications. He stated that on one occasion, Polish military intelligence obtained an 18-volume edition prepared by the United States Army Engineers regarding United States port facilities. It was purchased from the Government Printing Office at nominal cost, but its estimated value to the Polish military intelligence was placed at $50,000.

Not content with the large volume of publicly available material, Soviet-bloc officials have resorted to deceit. For example, on November 5, 1958, Ion Dubesteanu, an assistant military attache of the Rumanian Legation in Washington, D.C., was declared persona non grata for activity beyond the scope of his official duties. Using a false name and identity, Dubesteanu had corresponded with U.S. military installations soliciting material and had rented post office boxes at North Beach, Maryland, under assumed names to which such material was to be sent.

Reconnaissance trips by Soviet-bloc officials have been a most productive source of intelligence. The officials have been observed to carefully prepare for such trips by reviewing publications collected in this country, doing research at the Library of Congress, et cetera. Exclusive of trips from Washington, D.C., to New York City, officials of the Soviet Military Office alone took 16 trips

to various areas of the country in 1958 and 1959. They visited 26 states in 1958 and 37 in 1959. They covered most of the strategic areas of the country and covered some areas as many as four times. During these trips they followed a definite pattern of visiting chambers of commerce, driving around the perimeter of industrial facilities and wherever possible circled military, naval and air installations in the areas visited. They collected all available literature and maps relating to industrial facilities, transportation systems, power plants, dams, chemical factories, et cetera, and wherever possible took photographs in addition to making extensive notes.

7. *PROPAGANDA AND PERSONAL APPEARANCE*

Exploitation of our freedoms has also taken the form of propaganda. Not content with the distribution of over 20,000 copies of the illustrated monthly magazine, "USSR," which is in reciprocity for distribution of a similar American magazine in the Soviet Union, the Soviet Embassy has a carefully planned program of distributing press releases. As of February, 1960, the Press Department of the Soviet Embassy was distributing press releases to almost 7,000 individuals and institutions in the United States, including newspaper editors, business leaders, radio stations, public libraries, television stations, teachers, labor leaders, scientists, and leaders in trade and commerce.

In addition, since January 1, 1959, 30 different officials attached to the Soviet Embassy have made, or were scheduled to make, 74 public appearances (not including 7 additional invitations for appearances by the Soviet Ambassador) before various groups in this country. Nineteen other Soviets attached to the Soviet Delegation to the United Nations, employed by the United Nations Secretariat or assigned to Intourist, made, or were scheduled to make, 39 public appearances during the same period.

These public appearances normally involved speeches or participation in forums on the part of the Soviet officials and were made before various types of groups, including high school, college, and university groups, parent-teacher

associations, advertisement and civic clubs, fraternities, professional associations or clubs, religious and cultural groups, travel clubs and community centers. Some of these were television appearances. It is apparent that the Soviets are taking every opportunity to spread the gospel of communism by exploitation of the intense desire of Americans to learn more about the Soviet Union.

8. *USE OF THE UNITED NATIONS*

Attention is called to the fact that many of the incidents and cases previously cited involved Soviet employees of the United Nations. They are guests of the United States and are supposedly dedicated to the cause of international peace but they are, in fact, carefully selected envoys of the international communist conspiracy, trained in trickery and deceit and dedicated to the concept of fully exploiting the freedoms of the countries they seek to destroy. It is too much to expect that they would not prostitute the United Nations.

9. *"ILLEGAL" OPERATIONS*

Although Soviet-bloc intelligence services have made extensive use of their officials stationed in foreign countries for espionage purposes throughout the years, they have, in addition, operated a parallel clandestine espionage system known as the "illegal" system. As previously noted, "illegal" Soviet agents were dispatched to the United States as early as the 1920's. Such "illegal" agents have no ostensible connection with the Soviet-bloc official establishments in the United States, but operate clandestinely, usually under false identities, making full use of secret communications channels and other clandestine techniques of operation. Their dual function is to bolster the espionage activities of the Soviet-bloc officials and to be prepared to take over all espionage operations in the event of war or other emergency which would cause a break in diplomatic relations.

It is apparent that during the decade 1950-1960 the Soviets have placed increasing emphasis on "illegal" operations. One former intelligence officer of the Soviet Ministry of State Security has advised that a special

directorate was created in 1947 for the purpose of handling "illegal" agents. Another former intelligence officer, Reino Hayhanen, has stated that he was told, while in Moscow in 1952, that plans were being made to change over Soviet contacts from "legal" to "illegal" operations. Another former officer of the Soviet Ministry of State Security has advised that as early as June, 1952, an order was sent to intelligence agents in all western countries to prepare "illegal" organizations which could function without interruption under any condition.

That this policy was followed with respect to the United States is illustrated by the fact that in August, 1956, a female Soviet agent attempted to enter the United States from Canada at Detroit using an authentic copy of a birth certificate previously issued to an American. Detected by the United States border screening process, she was refused entry. Less than a year later, Rudolf I. Abel, a colonel in the Soviet Committee of State Security, was arrested in New York City where he was posing as an American photographer under the name Emil R. Goldfus. Abel had entered the United States in 1948 using a passport issued to a naturalized American in 1947 to visit relatives behind the Iron Curtain and who never returned to this country. Abel was subsequently convicted of espionage and sentenced to 30 years imprisonment, which sentence he is now serving.

It is interesting to note that in October, 1952, the Soviets sent Reino Hayhanen to the United States to act as Abel's assistant. Hayhanen, prior to leaving Russia, had been given instructions by Mikhail N. Svirin, a Soviet intelligence officer. After his arrival in this country, Svirin, who had become First Secretary of the Soviet Delegation to the United Nations, met with Hayhanen and subsequently, during the period 1952-1953, Hayhanen operated under his supervision. It was not until 1954 that Svirin gave instructions for Hayhanen to contact Abel and to act as Abel's assistant.

The case involving Abel and Hayhanen is a striking example of Soviet use of "illegal" agents against the United States. In dispatching such agents to this country, we can be certain that the Soviet-bloc intelligence services will, as they have with their representatives who are

dispatched to this country as diplomats, take full advantage of the freedoms of this country which are guaranteed by our Constitution.

10. *INTERNATIONAL ASPECTS OF SOVIET ESPIONAGE*

The United States has not been the only target of the Soviet-bloc intelligence organizations. Many other countries of the world have felt the barbs of the Soviet espionage attack. The disclosures of the Royal Commission in Canada which followed the 1945 defection of Igor Gouzenko, a Soviet code clerk, revealed a Soviet espionage apparatus which on a broad scale had recruited and subverted Canadian citizens while seeking to infiltrate the Canadian Government and drain off its secrets. The admissions of Klaus Fuchs in 1950 that he betrayed the free world when, as a member of the British Atomic Energy Team, he passed atomic secrets to the Russians clearly indicate the Soviet designs on information in possession of the British Government. The flight of the British scientist Dr. Bruno Pontecorvo in 1950 and the British diplomats Guy Burgess and Donald MacLean in 1951 behind the Iron Curtain adds additional proof. The report of the Royal Commission of the Commonwealth of Australia in 1955 following the defection of Vladimir and Evdokia Petrov, Soviet espionage agents assigned to the Soviet Embassy in Australia, disclosed an extensive Soviet espionage apparatus directed against Australia. Many similar examples could be cited to illustrate that Soviet espionage is international in character and the expulsion of two Soviet officials from Switzerland during the past month clearly indicates that Soviet espionage is currently international in character.

Practically every one of the cases cited above, although based in other countries, had ramifications in the United States. For example, information furnished to the Russians by Dr. Allan Nunn May, who was uncovered by Gouzenko, had been obtained when May visited a laboratory in Chicago in 1944. Klaus Fuchs worked on atomic energy in the United States from early 1944 through September, 1945, and supplied information to the Russians while in this country. The British diplomats Bur-

gess and MacLean had been stationed in the United States prior to their disappearance behind the Iron Curtain. In spite of the use of third countries by the Soviet Union to commit espionage against the United States, Premier Krushchev has made strong threats of reprisal against his neighboring countries which he assumes have been used as bases for United States aerial reconnaissance of the Soviet Union.

11. *AIMS OF INTERNATIONAL COMMUNISM*

The world-wide espionage networks of the Soviet Union are an essential and integral part of the over-all communist plan to completely dominate the world. However to understand the significance of the intelligence activity, it is necessary to examine the basic aims and principles of communism.

The highly authoritative "History of the Communist Party of the Soviet Union (Bolsheviks)" summarized the teachings of Marx and Engels on the question of force and violence. It stressed that Marx and Engels taught the impossibility of establishing a communist state by peaceful means, emphasizing that this could be achieved only through a proletarian revolution through which a dictatorship could be established and all resistance crushed. V. I. Lenin gave practical application to the teachings of Marx and Engels. Through the application of such principles the Bolsheviks seized power in Russia in 1917 and under Lenin's guidance, established a dictatorship through which all resistance was systematically crushed. The success of the movement led Lenin to reiterate in later years that "The substitution of the proletarian state for the bourgeois state is impossible without a violent revolution."

Joseph Stalin followed the Marxist-Leninist principles. The Communist Party in the United States, since it was organized in September, 1919, and throughout the years of Stalin's rule in Russia, was unalterably bound to Moscow. In the earlier years, Party leaders openly, boastfully and defiantly proclaimed their allegiance to and support of Soviet objectives. The nature of the Communist Party, USA, was exposed in 1949 and its leaders convicted in a court of law where the evidence laid out before the jury constituted irrefutable proof that the

Communist Party, USA, advocated the overthrow and destruction of the Government of the United States by force and violence. The policies and activities of the Communist Party, USA, have not changed to date. The current leaders of the Communist Party, like their predecessors, unwaveringly follow the lead of the Communist Party of the Soviet Union.

Time and again, Soviet Premier Khrushchev has claimed that the Soviet Union does not and will not interfere in the affairs of other nations. Yet, in practically every country in the world to date the Soviet Union has established fifth columns in the form of Communist Parties which are under the complete domination and control of the Soviets and are sworn to uphold and aid the Soviet dream for world conquest. Through the directives it furnishes to these subversive forces, the Soviet Union clearly interferes with the political, social, and economic affairs of other nations on a continuing basis in the relentless drive toward world domination.

Today, the rallying cry of world communism is "peaceful coexistence." However, on May 5, 1960, Premier Khrushchev, addressing the Supreme Soviet in Moscow, paid tribute to V. I. Lenin and stated "The Soviet people are proud to know that the cause of our great leader and teacher lives and triumphs and that Lenin's dreams are being translated into reality by hundreds and millions of people—builders of socialism and communism—and that Lenin's cause is winning all upright men on earth." Referring to the triumph of the ideas of Marx, Engels, and Lenin, Krushchev went on to reaffirm "Marxist-Leninist ideas" as the guide to the ultimate triumph of world communism.

Thus, the fact remains that the basic principles of Marxist-Leninist philosophy, demanding the use of force and violence, represent the guides for communism to achieve world conquest. The extensive espionage activities directed against the United States which, in the past, have utilized communists and communist sympathizers in this country as well as other individuals who could be subverted, can be better understood when regarded as essential tools in the relentless and fanatical drive of international communism to conquer the world.

APPENDICES

I. *CASES INVOLVING COURT ACTIONS DURING THE PAST DECADE*

There are set forth hereinafter cases which have been presented to Federal Courts in the United States during the past ten years and which unquestionably reveal Soviet efforts to steal American secrets affecting the national security of this country. All these cases have withstood the exacting test of being tried under the democratic system of the American courts and the convictions obtained are ample proof of the charges made.

* * * *

F. *Jack Soble Case*

In the early 1940's the FBI was conducting an intensive investigation into the activities of Vassili Zubilin (true name, Vassili Mikhailovich Zarubin), Third Secretary of the Soviet Embassy, Washington, D.C. Zubilin had entered the United States on December 25, 1941, with his wife, Elizabeth, and son, Peter. The investigation disclosed that Zubilin had been an important Soviet intelligence agent for many years. During 1934-1937 he was in the United States on several occasions utilizing an American passport fraudulently obtained under the name of Edward Joseph Herbert.

The first break in the FBI investigation came when in the Spring of 1943, Zubilin, while under physical surveillance by the FBI, was observed to contact Boris Michael Morros, a motion-picture producer in Hollywood. After extensive investigation into the activities of Morros, he was interviewed by the FBI in July, 1947, and admitted he was recruited by Zubilin for Soviet intelligence activities. Morros, thereafter, agreed to operate as a double agent against the Soviets under the direction of the FBI. Thus began an operation of intrigue which led to the expose of a Soviet espionage ring in New York City culminated by the arrest on January 25, 1957, by FBI agents of Jack Soble, Myra Soble and Jacob Albam on charges of conspiring to commit espionage. In addition,

the FBI investigation resulted in identifying as Soviet intelligence agents, Jane and George Zlatovski, who were indicted on July 8, 1957, charged with espionage conspiracy; Alfred and Martha Stern, who were indicted on September 9, 1957, on two counts charging espionage conspiracy; Ilya Wolston, who was charged with contempt for failing to appear before a grand jury and on August 7, 1958, pleaded guilty in the Southern District of New York; Mark Zborowski, who was indicted for perjury on April 18, 1958, as a result of his denial before the Federal Grand Jury that he knew Jack Soble; and Vassili Molev, an official attached to the Soviet Embassy, Washington, D.C., who was declared persona non grata, January 25, 1957.

1. *Jack and Myra Soble*

Jack Soble entered the United States in 1941 as a Lithuanian refugee and in 1947 became a United States citizen by naturalization. As early as 1944 Soble participated with other Soviet agents in the operation of a business concern organized to serve as a "cover" for Soviet agents. This was the Boris Morros Music Company with offices in New York and Los Angeles. In December, 1943, Vassili Zubilin introduced Morros to Alfred K. Stern and his wife, Martha Dodd Stern, at which time it was agreed Stern would invest $130,000 in Morros' business, becoming an officer, and learn the business. This arrangement was consummated in early 1944. Shortly after the agreement was made between the Sterns and Morros, Zubilin advised Morros that he was leaving the United States and introduced Morros to Jack Soble, a resident of New York City. Zubilin instructed that Soble was thereafter to act as Morros' and Stern's superior.

Soble supervised activities of Soviet agents both in the United States and Europe; assigned them to recruit U.S. Government employees stationed abroad, to obtain information concerning military equipment and supplies; and has claimed to have obtained information concerning the number of atomic bombs stockpiled in the United States and the rate of atomic bomb pro-

duction as well as photographs of atomic "bunkers" in which bombs were stored.

His wife, Myra Soble, also a Lithuanian refugee, assisted him in his espionage operations.

Jack and Myra Soble were arrested by FBI Agents on January 25, 1957, and were indicted on February 4, 1957, on five counts charging espionage, conspiracy and violation of the Registration Acts. On April 10, 1957, they pleaded guilty to count two of the indictment which charged violation of Section 793, Title 18, U.S. Code (commonly referred to as the peace-time espionage statute) which carries a maximum sentence of ten years. On August 9, 1957, Myra Soble was sentenced to five and one-half years in Federal prison and the other counts of the indictment were dismissed as to her. On October 8, 1957, Jack Soble was sentenced to seven years imprisonment. At that time Myra Soble's sentence was reduced to four years. The other counts of the indictment were dismissed.

2. *Jacob Albam*

Jacob Albam, associated with the Sobles in the espionage conspiracy, is also a native of Lithuania. His application for U.S. citizenship in 1951 has not been granted. Jacob Albam first came to the United States in 1947 on a visitor's visa from France. Soble had an assignment from the Soviets to obtain an American woman for Albam to marry and to set Albam up in business in the United States. Albam was married to an American woman in the Spring of 1948 and returned to France, later re-entering the United States as an immigrant husband of an American citizen and subsequently applying for American citizenship. He purchased an interest in a business in New York which later went bankrupt and subsequently he was employed by his brother who operates a business in New York City.

Albam has been described as a specialist in handwriting, "copying" and photography. When contacted in 1955 by Boris Morros, Albam acknowledged the

code name assigned by his Soviet supervisors, admitted receipt of money to establish himself in this country and agreed to take further Soviet instructions.

Albam was also arrested on January 25, 1957, and indicted on the same charges and on the same date as the Sobles. He pleaded guilty to count two of the indictment on February 26, 1957. On August 9, 1957, he was sentenced to five and one-half years. The other counts of the indictment against Albam were dismissed. On October 8, 1957, Albam's sentence was reduced to five years.

3. *Jane and George Zlatovski*

Jane and George Zlatovski, American citizens currently residing in France, served under Jack Soble's supervision from 1945 to 1951. In a report intercepted by Boris Morros, Jane Zlatovski claimed that while employed by the U.S. Army in Austria in 1947-1948, she obtained through her Army employment names, photographs and biographies of agents of the Counter Intelligence Corps and the Central Intelligence Agency, similar information concerning their "native agents" and "practically every scheme they hatched." Only disruption of contact with her superiors prevented successful delivery of such information to the Soviet Intelligence Service.

Jane and George Zlatovski were indicted on July 8, 1957. The indictment contained two counts charging both with espionage conspiracy similar to the Soble indictment. The Zlatovskis were not arrested inasmuch as they reside in France and efforts to effect their return from France to date have been unsuccessful.

4. *Alfred and Martha Stern*

The Sterns are both American-born citizens. They were originally identified as Soviet agents by Boris Morros in July, 1947, when he reported that they had participated with him and Vassili Zubilin in the establishment of a business concern (the Boris Morros

Music Company) which was to be used as a "cover" for Soviet intelligence agents. It was agreed that Stern would invest $130,000 in Morros' business, become an official and learn the business. Since Jack Soble pleaded guilty, he has confirmed that the Sterns were Soviet agents.

When the Sobles and Albam were arrested on January 25, 1957, the Sterns were residing in Mexico City. They were subsequently served with subpoenas calling for their appearance in New York City before the grand jury hearing the Soble case. They refused to honor the subpoenas and on May 1, 1957, they were fined $25,000 each for contempt. On the following date warrants were issued for their arrest as material witnesses. They were indicted on September 9, 1957, on two counts charging espionage conspiracy and one count charging general conspiracy. The Sterns were not arrested inasmuch as they fled from Mexico to Czechoslovakia clandestinely in July, 1957.

5. *Ilya Wolston*

Wolston was born in Russia. He entered the United States on April 30, 1939. He was naturalized a United States citizen on May 18, 1943. In 1942-1946 he served in the U.S. Army, in 1943 attending the U.S. Army Intelligence School at Camp Ritchie.

On several occasions beginning May 7, 1950, Jack Soble furnished Boris Morros with information concerning an individual he described as a U.S. Army Colonel in Germany who furnished him information under the code name "Slava," which was very valuable to the Soviets. It is noted that from October 1949, until July, 1951, Wolston was employed by the U.S. High Commissioner of Germany in Berlin. In January, 1955, Soble identified his nephew, Ilya Wolston as "Slava." In addition, Jack Soble, pleading guilty in April, 1957, furnished information identifying Wolston as a Soviet agent who provided him information for the Soviets on several occasions beginning when Wolston was in a military camp, about 1943. Soble said Wolston gave him information concerning his

assignments and names of four persons at the camp whom he believed could be approached by the Soviets.

Information concerning the probable identification of Wolston as a Soviet agent was furnished to the Department of State in 1951, together with data developed concerning his black market activities in Germany. The Department of State, on the basis of these data, dismissed Wolston from his employment in Berlin.

On August 13, 1958, Wolston was sentenced to one year's imprisonment for contempt for failure to appear before a Federal Grand Jury in July, 1958. The sentence was suspended and he was placed on three years' probation conditioned on his being available to process of the court within the three-year period.

6. *Mark Zborowski*

Zborowski was born in Russia and became a naturalized U.S. citizen in New York City in June, 1947. Zborowski was employed as a language consultant in 1943-1944 by the War Department in New York City. Jack Soble advised that Zborowski acted as a Soviet agent under his supervision during the approximate period 1943-1945, furnishing information concerning Trotskyites and other anti-Stalin elements. Zborowski denied knowing Soble before a Grand Jury in February and March, 1957, and in an interview August 11, 1957. However, when confronted by Soble on August 7, 1957, he admitted Soble had been one of his espionage superiors.

Zborowski was indicted for perjury April 18, 1958, was found guilty after trial on November 20, 1958, and on December 8, 1958, was sentenced to five years' imprisonment. On November 10, 1959, the Court of Appeals reversed the conviction and remanded the case for a new trial.

7. *Vassili Molev*

Vassili Molev, while attached to the Soviet Delegation to the United Nations, New York City, in 1953 (handling maintenance, purchase of supplies and simi-

lar matters) met Boris Morros on a date and at a time and place previously designated by Morros' Soviet intelligence superiors in Austria. Molev accepted from Morros a report prepared in New York by Jack Soble and given by Soble to Morros in accordance with instructions from their Soviet superiors. Photographs, both still shots and motion pictures, of this meeting were taken by FBI personnel.

Immediately following the arrest of Jack Soble on espionage charges on January 25, 1957, the U.S. Department of State declared Molev persona non grata. Molev at that time was employed (in a similar capacity) by the Soviet Embassy, Washington, D.C. He left the United States on January 28, 1957, en route to Russia.

8. *Mikhail Nikolaevich Svirin*

Mikhail Svirin, a Soviet assigned to the Soviet United Nations Delegation, New York City, from August, 1952, to April, 1954, was identified by Yuri A. Rastvorov, a former Soviet intelligence officer, as a member of the Ministry of Internal Affairs and a very experienced intelligence officer.

On two occasions in January and February, 1953, Svirin was observed in the area where Boris Morros was scheduled to meet with his Soviet superior. Morros subsequently met Vassili Molev on March 3, 1953, at the scheduled meeting place.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Cr. 156-24

In the Matter of

ILYA WOLSTON,

A Witness Before the January 1957
Special Grand Jury

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:
SOUTHERN DISTRICT OF NEW YORK)

AFFIDAVIT

HERBERT C. KANTOR, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney for the Southern District of New York, familiar with the facts in the above-named case, and I make this affidavit on information and belief in support of the Government's motion to hold Ilya Wolston in contempt and in reply to Wolston's affidavits and papers served upon the United States Attorney on Friday, July 25, 1958.

2. On Monday, July 28, 1958, the above motion was argued before the Honorable John M. Cashin. Leave was granted the Government to file these papers in reply to the affidavits and papers served by Ilya Wolston on the United States Attorney on July 25, 1958. Following the argument of this motion, the January 1957 Special Grand Jury, having served the full period allowed by statute, was discharged by the Court.

3. This motion was brought on by an order signed by Honorable Edward J. Dimock on July 14, 1958, returnable July 28, 1958, which directed Ilya Wolston to show

cause why he should not be held in contempt for his failure to comply with the subpoena issued by the District Court directing his appearance before the Grand Jury for the Southern District of New York on July 1, 1958. The defendant has conceded that both the subpoena and the order to show cause have been properly served upon him, and that he did not in fact appear before the Grand Jury on July 1, 1958.

4. The inquiry conducted by the January 1957 Grand Jury underwent three distinct phases. Following its empaneling in January, it heard testimony relating to the activities of Jack Soble, which resulted in the indictment of Soble and others on February 4, 1957. The Grand Jury continued to hear testimony during the first months of its session relating to the activities of various Soviet agents who conducted espionage against the United States in close contact with Jack Soble. On April 10, 1957, Jack Soble, Myra Soble, and Jacob Albam, pleaded guilty to committing espionage against the United States and thereafter cooperated with the Government by testifying before the Grand Jury. The hearing of the testimony of the defendants by the Grand Jury constituted the second phase of the investigation conducted by this Grand Jury. Following the completion of this phase of the inquiry, the testimony that had been given to the Grand Jury since its inception was evaluated, and the Grand Jury determined that it desired to re-investigate certain matters and to go into new matters. During the year 1958 this third phase of the Grand Jury inquiry was undertaken.

5. Ilya Wolston first appeared before the Grand Jury during the early months of its session and prior to Jack Soble's pleading guilty to committing espionage against the United States on April 10, 1957. On May 16, 1957, the United States Attorney received a letter from Wolston containing a certificate of Dr. Isidore Rodis, which stated that Wolston was suffering from "dizzy spells, insomnia and loss of appetite," and he could not therefore travel to New York. On June 24, 1957, a subpoena was issued for Wolston's appearance before the Grand Jury on June 28, 1957. The day before Wolston was scheduled to appear before the Jury, on June 27, 1957, Mrs. Wolston

telephoned Thomas B. Gilchrist, Jr., Chief Assistant United States Attorney, to state that Wolston was unable to appear before the Grand Jury. Gilchrist stated that if Wolston did not see fit to appear in the near future, the Government might take action to force his compliance. Wolston did not appear before the Grand Jury on June 28, 1957. On July 8, 1957, the United States Attorney received a letter from Mrs. Wolston containing a certificate of Dr. Robert H. Groh, which stated that Wolston was "too ill with an emotional disorder to * * * be questioned * * * at this time." On May 9, 1958, a subpoena was issued for Wolston's appearance before the Grand Jury on May 19, 1958. This was the first subpoena addressed to Wolston in over ten months, and it occurred during the third phase of the Grand Jury inquiry referred to above. On May 16, 1958, Mrs. Wolston telephoned me and informed me that Wolston could not travel without her, and that she could not get off from work for one week. As a courtesy to Wolston, without consulting the Foreman of the Grand Jury, I adjourned the subpoena for one week to May 23, 1958. On May 21, 1958, the United States Attorney's office received a letter from Mrs. Wolston containing the certificate of Dr. Edward F. Kerman. This certificate stated "Mr. Wolston is too ill to be subjected to questioning." On May 23, 1958, the Grand Jury convened, but Wolston did not appear. In view of the fact that the original subpoena had been adjourned for the convenience of Wolston and without the direction of the Foreman of the Grand Jury, this failure of Wolston to appear before the Grand Jury on the adjourned date could not be enforced by contempt proceedings. Having taken advantage of the Government's courtesy, Wolston violated his obligation with impunity. On the same day that he failed to appear, a new subpoena was issued for Wolston's appearance on May 27, 1958. One day before Wolston was scheduled to appear, on May 26, 1958, Mrs. Wolston told Arthur H. Christy, then Chief Assistant United States Attorney, that Wolston was mentally disturbed and panicked at the thought of testifying before the Grand Jury, but that he had obtained a job four or five

weeks ago and might soon be available. Christy stated that should Wolston fail to comply with the subpoena, the Government would be required to take serious steps. Mrs. Wolston left the United States Attorney's office stating that Wolston would probably appear before the Grand Jury on May 27, 1958.

6. On May 27, 1958, Mr. and Mrs. Wolston appeared at the United States Court House, Foley Square, and requested to see me. At the same time my presence was required in the United States District Court for the Southern District of New York, in Room 318 of the United States Court House, where the case of *United States* v. *Charles Korba* [C 154-348] was on the trial calendar of the Court. At approximately 10:30 in the morning I was assigned to commerce trial in the *Korba* case before the Honorable Irving R. Kaufman. I immediately returned to my room and advised Wolston that I had been assigned to trial, and that his appearance before the Grand Jury would therefore have to be cancelled since I was the only one sufficiently versed in the matters being presented to the Grand Jury to be able to interrogate him. I asked Wolston as long as he was present in New York whether he was willing to speak to F.B.I. agents. Wolston said that he was, and the agents and Wolston arranged for Wolston to be interrogated in Washington, D.C. I advised Wolston that he would have to come back to New York at a subsequent time in order to testify before the Grand Jury. To my observation he was responsive to my questions, his conduct was appropriate to the occasion, and he appeared physically fit despite his trip to New York from Washington.

7. On June 9, 1958, a subpoena was issued for Wolston's appearance before the Grand Jury on June 17, 1958. On June 17, 1958, the Grand Jury convened but Wolston did not appear. Subsequent investigation determined that Wolston could not be located at his residence or alleged place of employment, and that the subpoena was not therefore served upon him. On June 18, 1958, the United States Attorney received a letter from Mrs. Wolston containing the certificate of Dr. Edward Kerman, which stated that it was his recommendation that the United States Attorney should "call off further questioning of

[his] patient for a period of six months to a year." The certificate further stated "that continued demands on my patient of the nature that now exists will terminate in a suicidal attempt on his part."

8. On June 23, 1958, a subpoena for Wolston's appearance before the Grand Jury on July 1, 1958, was issued. After several attempts the service of a copy of this subpoena was effected upon Ilya Wolston at his residence on June 28, 1958. The day Wolston was to appear before the Grand Jury, on June 30, 1958, Sidney Dickstein, Esq. telephoned me stating that he was calling on behalf of counsel for Wolston who was not available, and that he requested an adjournment of Wolston's appearance before the Grand Jury. In view of my past experience in this matter, I declined to grant such adjournment and further stated that Wolston would have to appear before the Grand Jury, and if there were any reasons for his not testifying he should make them known to the Grand Jury and to a court, if necessary. I further stated that should Wolston fail to appear, the Government would take appropriate measures to punish his refusal to comply with the subpoena. On July 1, 1958, the Grand Jury convened, but Wolston failed to appear. Wolston has submitted numerous certificates as to his mental condition, but it does not appear that he could not have been physically present on the date that the subpoena commanded his appearance. Should there be such facts as would excuse Wolston from testifying, these facts, if they exist, could have been then presented to the Grand Jury and to the Court. There is no excuse for his repeated failures to appear.

9. Wolston's actions demonstrate deliberate disregard for the process of this Court. He has appeared or failed to appear before the Grand Jury according to his own whim. His refusal to appear before the Grand Jury to give testimony on July 1, 1958, constitutes a completed criminal contempt. In this case it has resulted in Wolston's avoiding testifying before this Grand Jury. In a last minute effort to avoid the possible punishment for his contemptuous behavior, Wolston sought to appear before the Grand Jury on the final day of its statutory

period. Such an appearance, however, would have been meaningless. The interrogation of Wolston in a matter as complicated and as serious as espionage could not for all practical purposes be conducted on such short notice. What is more, should this Grand Jury have desired to take any action as a result of Wolston's testimony, or should they have desired to call witnesses to further inquire into the subject of Wolston's testimony, they would have had no time to do so. The proposed eleventh hour appearance cannot be reconciled with the numerous occasions in which Wolston caused the Grand Jury to convene and stand idle. The power of the Grand Jury to conduct an orderly inquiry is at stake in this case. The Grand Jury should not be required to rely upon the whimsy of a proposed witness, nor should a witness be allowed to disobey the orders of a court and avoid punishment therefor by a last minute offer to appear.

WHEREFORE, the Government requests that Ilya Wolston be held in contempt and be punished for such contempt as to the Court may seem just and proper in view of all the circumstances.

/s/ Herbert C. Kantor
HERBERT C. KANTOR
Assistant United States Attorney

Sworn to before me this 29th day of July, 1958.

/s/ Leo Cohen
LEO COHEN
Notary Public
State of New York

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-459

ILYA WOLSTON, PLAINTIFF

v.

READER'S DIGEST ASSOCIATION, INC., doing business as READER'S DIGEST PRESS, ET AL., DEFENDANTS

AFFIDAVIT

DISTRICT OF COLUMBIA) SS

ILYA WOLSTON, being duly sworn, deposes and says:

1. My name is Ilya Wolston. I am the plaintiff in this case and submit this affidavit to supplement the facts stated in my deposition of December 10, 1975.

2. In January 1957, the FBI arrested Jack Soble and his wife, my uncle and aunt on espionage charges. On the day of their arrest, my wife and I were "invited" to FBI headquarters and interrogated for several days. Thereafter I was subjected to successive interrogations in New York and Washington, my appearances in New York compelled by grand jury subpoenas.

3. My mental illness which had its inception during the illness and death of my daughter (see deposition pp. 40-42), worsened and I was under continuing treatment, which involved some thirteen electro-shock treatments in 1957 alone. Representations concerning my condition were made to Office of the United States Attorney for the Southern District and medical certificates were submitted in an effort to persuade the FBI and the Assistant United States Attorney who was conducting the investigation not to require me to continue to travel to New York for lengthy interrogations, and to accept instead my offer to see them in Washington for more frequent but shorter sessions. This proved to no avail.

4. I was served with another New York Grand Jury subpoena for May 27, 1958. I came to New York with

my wife on May 27th to be told that the Grand Jury would not be sitting. Instead I was ushered into a room and subjected to further interrogation.

5. On Saturday, June 28, 1958 I was served with another subpoena requiring my attendance in New York on July 1st. I did not appear. An order to show cause why I should not be held in contempt was issued returnable July 28th. I appeared in Court on July 28th intending to indicate my willingness to testify, but learned for the first time that the Grand Jury was to be discharged that very day. I made an offer in open court to testify before the Grand Jury before its discharge, but the offer was rejected by the Assistant United States Attorney, who first asserted that the Grand Jury's term had expired the day before, a Sunday, and then stated that he was not prepared to conduct the examination.

6. The Grand Jury was discharged and a criminal contempt hearing was commenced. My wife, who was then pregnant, was called to testify as to my mental condition on the return date of the subpoena, but she broke down hysterically during the course of her testimony. Rather than subject her and me to the continued trauma of a trial, and upon assurance that no jail term would be imposed, I pleaded guilty to contempt. A one year sentence was suspended conditioned on my subsequent cooperation with federal authorities and I was placed on three years probation.

7. I have been damaged in my reputation, and have been subject to embarrassment and humiliation as a result of the false statements which appear in *KGB* identifying me as a Soviet Agent, linking me with convicted spies and stating that I have been indicted for espionage.

8. I have been unable to find employment since the publication of *KGB*, although I have tried to do so.

/s/ Ilya Wolston
ILYA WOLSTON

Sworn to this 15th day of June, 1976.

/s/ [Illegible]
Notary Public

My Commission Expires March 31, 1978

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-459

ILYA WOLSTON, PLAINTIFF

v.

READER'S DIGEST ASSOCIATION, INC., doing business as READER'S DIGEST PRESS, ET AL., DEFENDANTS

OPINION AND ORDER—Filed Jan. 31, 1977

In this diversity action the plaintiff, Ilya Wolston, seeks to recover compensatory and punitive damages for allegedly libelous statements about him that appear in the book *KGB, The Secret Work of Soviet Agents* (*"KGB"*), authored by defendant John Barron, published by defendant Reader's Digest, offered as a selection by defendants Book-of-the-Month Club and Macmillan Book Clubs, and reprinted in paperback by defendant Bantam Books. The defendants claim that no genuine issue of material fact exists and that they are entitled to judgment as a matter of law, and have moved for summary judgment. Rule 56, Fed. R. Civ. P.; Local Rule 1-9(h). Wolston, Barron, and representatives of each of the other parties have submitted affidavits, plaintiff and defendant Barron have been deposed, and the court has heard oral argument by counsel for both sides.

The first question the court must consider is what degree of fault would plaintiff be required to demonstrate if this matter were to go to trial. Defendants claim a constitutional privilege with respect to statements they published concerning Wolston. They contend that he qualifies as a "public figure" for purposes of libel law, and they urge the court to adopt the "actual-malice" standard. *See, e.g., Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967). Alternatively, defendants contend that Wolston became involved in a matter of "public concern" and that, in such a case, the law in the District of Columbia requires application of the actual-malice standard even if the plaintiff does not qualify as a public figure. *Hatter* v. *Evening Star Newspaper Co.*, Civil

No. 8298-75 (Sup. Ct. D.C. March 15, 1976). Wolston sees matters differently. He contends that he is a "private-individual" plaintiff for purposes of a libel suit and observes that, if that is so, the court can impose liability on defendants under any standard short of liability without fault. *See generally Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974); *Time Inc.* v. *Firestone*, 424 U.S. 448 (1976). He suggests that the court adopt either a negligence or gross negligence standard for libel concerning private individuals. He argues that the court is not bound by the decision of the Superior Court of the District of Columbia in *Hatter* v. *Evening Star*, *supra*, and that, in any event, the court should distinguish that decision.

The second question the court must consider is whether, under the appropriate standard, the pleadings, affidavits, and depositions demonstrate the existence of issues that are inappropriate for summary resolution. In this connection plaintiff disputes defendants' contention that no genuine issues of fact exist. He argues that defendants have failed to establish as a matter of law the nonexistence of fault on each of their parts and that this is so regardless of which standard of fault applies. Therefore, he claims, the court should deny defendants' motion and permit plaintiff to proceed to trial.

I. FACTUAL BACKGROUND

In January 1957 Ilya Wolston, a naturalized American citizen residing in the District of Columbia,[1] received a subpoena directing him to appear before a special federal

[1] Wolston was born in Russia in 1918. He subsequently lived in Lithuania, Germany, France, and England before coming to the United States in 1939. The army drafted him in 1942, and during his tour of duty he became a naturalized citizen; he was trained as an interpreter and served primarily in Alaska. After receiving an honorable discharge in 1946 he worked as an interpreter for the United States Military Government and the State Department in Allied-occupied Berlin. He returned to the United States in 1951 and worked as a clerk until 1953, when he enrolled in an undergraduate program at New York University. In 1955 he and his wife moved to Washington, D.C., where he worked several months for the Army Map Service and then as a free-lance translator until January 1957. Deposition of Ilya Wolston at 5-42.

grand jury in New York City. The grand jury had been investigating the activities of Soviet intelligence agents in the United States; it summoned Wolston shortly after the Federal Bureau of Investigation arrested his aunt and uncle, Myra and Jack Soble, for espionage.[2]

Wolston traveled to New York on several occasions, but failed to respond to a subpoena requiring him to appear on July 1, 1958. He was charged with criminal contempt, he pleaded guilty, and he was sentenced to one year in prison. The sentence was suspended and Wolston was placed on probation for three years. His failure to appear before the grand jury and his subsequent plea of guilty were mentioned or discussed at the time in some fifteen newspaper stories in New York and Washington, D.C. Deposition of Ilya Wolston at 62-72.

In 1959 Viking Press, Inc. published the book *My Ten Years As A Counterspy*, by Boris Morros. A one-time confederate of Jack Soble who later served as an intelligence agent for the F.B.I., Morros in this book, identified plaintiff as a Soviet agent in the United States. According to Morros, Soble claimed that an individual who had operated in Germany under the code name "Slava" had supplied him with information valuable to the Soviets.[3] Subsequently, Morros says in his book, Soble identified Ilya Wolston as "Slava."[4] Morros also states, however, that he knew Soble to be a "confirmed liar" and acknowledges that Soble was his only source of information concerning Wolston.[5]

In a report entitled "Expose [sic] of Soviet Espionage May 1960" the F.B.I.[6] reiterated the information that

[2] The Sobles pleaded guilty in April 1957 to one count of an indictment charging them with violation of 18 U.S.C. § 793, the so-called "peace-time espionage statute."

[3] Morros, *My Ten Years As A Counterspy*, 176, 183, 187-91, 193, 195-96, 204, 210, 222, 225, 229, 238, 247 (1959).

[4] *Id.* at 247.

[5] *Id.*

[6] The F.B.I. prepared the report; it was published by the Senate Subcommittee to Investigate the Administration of the Internal Security Act, Committee on the Judiciary, 86th Cong., 2nd Sess. (1960).

Soble had furnished to Morros and noted that Soble had also described Wolston's intelligence activities to the government. *Id.* at 26. The report states:

> "On several occasions beginning May 7, 1950, Jack Soble furnished Boris Morros with information concerning an individual he described as a U.S. Army Colonel in Germany who furnished him information under the code name 'Slava,' which was very valuable to the Soviets. It is noted that from October, 1949, until July, 1951, Wolston was employed by the U.S. High Commissioner of Germany in Berlin. In January, 1955, Soble identified his nephew,[7] Ilya Wolston, as 'Slava.' In addition, Jack Soble, pleading guilty in April, 1957, furnished information identifying Wolston as a Soviet agent who provided him information for the Soviets on several occasions beginning when Wolston was in a military camp, about 1943. Soble said Wolston gave him information concerning his assignments and names of four persons at the camp whom he believed could be approached by the Soviets.
>
> "Information concerning the probable identification of Wolston as a Soviet agent was furnished to the Department of State in 1951, together with data developed concerning his black market activities in Germany. The Department of State, on the basis of these data, dismissed Wolston from his employment in Berlin.[8]

Id. at 25-27. The report does not indicate that its authors relied exclusively on Soble in identifying Wolston as an agent. On another page it simply lists Wolston's name among people "the F.B.I. investigation resulted in identifying as Soviet intelligent agents." *Id.* at 24.

The present action arises from the publication in 1974 of *KGB*, which summarizes Soviet espionage efforts since

[7] *See* Note 1, *supra*.

[8] In his deposition Wolston claims that a reduction in force accounted for the loss of his State Department job and that the reference to "black market activities" is false. Deposition of Ilya Wolston at 27-28, 89-90.

World War II. Wolston objects to the following sentence and footnote, which appear on page 188 of the Reader's Digest Press edition:

> "Among Soviet agents identified in the United States were Elizabeth T. Bentley, Edward Joseph Fitzgerald, William Ludwig Ullman, William Walter Remington, Franklin Victor Reno, Judith Coplan, Harry Gold, David Greenglass, Julius and Ethel Rosenberg, Morton Sobell, William Perl, Alfred Dean Slack, Jack Soble, Ilya Wolston, Alfred and Martha Stern.*
>
> * No claim is made that this list is complete. It consists of Soviet agents who were convicted of espionage or falsifying information or perjury and/or contempt charges following espionage indictmnets, or who fled to the Soviet bloc to avoid prosecution . . ." [9]

Plaintiff states that he did not serve as a Soviet agent and that he was never indicted for espionage; [10] he complains that assertions in *KGB* to the contrary have damaged his reputation, embarrassed, and humiliated him.[11] He contends that Barron knew that Soble was, as Morros

[9] Plaintiff reads this footnote as falsely stating that he was indicted for espionage. Defendant Barron in his deposition claims that he meant to say no such thing. Rather, he states, "I believe and know that he [Wolston] fell in the category of someone who was convicted of contempt of court following espionage indictments, whch raised matters about which he refused to testify." Deposition of John Barron at 57. Thus, according to Barron, the phrase "following espionage indictments" merely provides the context in which plaintiff's contempt conviction occurred.

[10] *See* Note 9 *supra*. For purposes of this motion the court assumes plaintiff's contentions in this regard are true. At a trial on the merits, however, proof that the assertions in *KGB* are true would constitute a defense and bar plaintiff from recovering damages for libel.

[11] Although his complaint makes no mention of lost income, in Wolston's deposition he attributed loss of "potential income" to *KGB* on the ground that, "If I were not called a Soviet agent, I would most likely be well employed." Wolston Dep. at 105. Wolston acknowledges, however, that he was unemployed for the six years preceding publication of *KGB* with the exception of occasional services for which he received "very negligible" compensation. *Id.* at 53-54.

put it, a "confirmed liar;" that Barron therefore had reason to doubt the F.B.I.'s report; that Barron failed adequately to investigate the charges he levelled against plaintiff and instead, together with the co-defendants, published *KGB* in reckless disregard of the truth of those charges.

Defendants contend that Wolston has brought this lawsuit 15 years too late, that is, that any damage he suffered as a result of identification of him as a Soviet agent is attributable to Morros's book and the F.B.I.'s report. In his affidavit defendant Barron states that for purposes of documenting information about Wolston he relied on the F.B.I.'s report,[12] that he had reason to believe the report was accurate,[13] and that he was "[a]t no time . . . aware of any fact that would give . . .[him] reason to doubt the truth of . . . [that report] or of any other statement in it." [14] Thus, although he admits he was aware of Morro's views regarding Soble's credibility,[15] Barron claims that Soble's reputation for truthfulness caused him no concern because Soble had earned it while acting as a spy; [16] by contrast, according to

[12] Affidavit of John Barron at 2. The report is cited in *KGB* as a source for chapter nine of the book, the chapter that contains references to the plaintiff. *KGB, The Secret Work of Soviet Agents* 430 (Reader's Digest Ed.) (1974).

[13] In his deposition Barron indicates that he worked as a newspaper reporter for a number of years and that in that connection the F.B.I. provided him with consistently reliable information; that the F.B.I.'s report is consistent with other sources, i.e. Boris Morros's book; and that "this was a considered formal statement by the F.B.I. bearing the imprimatur and passive endorsement of a constituted committee of the Senate, responsible for internal security matters; and our experience has been that statements of the F.B.I. issued under such circumstances are reliable and legally defensible." Deposition of John Barron at 66-67.

[14] Affidavit of John Barron at 3.

[15] Deposition of John Barron at 73.

[16] Barron says in his deposition: "I think we are speaking about, in a sense, two different people here—the Jack Soble as a Soviet agent and still under Soviet discipline, who was a professional agent, dissembling by nature and not necessarily immorally in his scheme of ethics as an agent, and then the Jack Soble who for reasons of his own decided to tell what he knew to the United States Government." Deposition of John Barron at 73.

Barron, Soble provided information to the Government after his arrest that proved "extremely useful and . . . quite reliable in many cases." [17] And in any event, according to Barron, the F.B.I. report clearly relied on sources other than Jack Soble in identifying Wolston as an agent.[18] Defendants Book-of-the-Month Club, Macmillan, and Bantam state that they relied on the reputation of Reader's Digest Press in concluding that *KGB* is accurate in every respect.[19] Defendant Reader's Digest admits that its liability in this suit is coextensive with that of John Barron, its employee.[20]

II. FIRST AMENDMENT RESTRICTIONS ON LIBEL LAWS

In determining the standard of fault that applies in a libel action, courts must strike a balance between First Amendment values, on the one hand, and the states' concern for protecting the reputations of their citizens, on the other. The Supreme Court in recent years has said that insofar as "public officials" and "public figures" are concerned, the balance must be struck in favor of the freedoms of speech and press. *New York Times* v. *Sullivan*, 376 U.S. 254 (1964); *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967). Because would-be critics and commentators need "breathing space," or margin for error, if debate over "public issues . . . [is to] be uninhibited, robust, and wide-open," *New York Times*, *supra*, 376 U.S. at 270, libel plaintiffs who qualify as

[17] *Id.* at 72-73.

[18] Barron observes in his deposition that any information concerning Wolston the Government possessed in 1951 could not have come from Soble, who was arrested in 1957, *id.* at 71-72, and that the report, at page 24, makes no mention of Soble in categorically identifying Wolston as a Soviet agent, *id.* at 68-72. Of course, all of the Government's information concerning Wolston may have come indirectly through Soble, *e.g.* through Boris Morros in 1951.

[19] Affidavits of Al Silverman, Vice President and Editorial Director of Book-of-the-Month Club, Inc.; William Houghton, President of MacMillan Book Clubs, Inc.; Marcus Jaffe, Senior Vice President and Editorial Director of Bantam Books, Inc.

[20] Brief for Defendants at 17n. 45.

public officials or public figures must satisfy an exceptionally demanding burden of proof. They must establish with "convincing clarity" that the allegedly libelous statements concerning them were made with "actual malice" —that is, actual knowledge of falsity or reckless disregard for the truth. *Id.* at 279-80, 285-86. In *Rosenbloom* v. *Metromedia*, 403 U.S. 29 (1971), a plurality of the Court went still further, concluding that the Constitution accords similar protection to criticism of *private* individuals who become involved in areas of public interest.

In recent decisions a majority of the Supreme Court has made clear its determination that the Rosenbloom plurality failed, for constitutional purposes at least, to allow the states sufficient latitude to protect private individuals from libel. In *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974), the Court held that the Constitution does not compel application of the *New York Times* standard in a libel suit brought by a "private individual." Rather, the states' legitimate interest in protecting the reputations of private individuals is strong enough to justify permitting such persons to recover damages from publishers or broadcasters under any standard short of liability without fault. 418 U.S. at 339-48. The Court reiterated and applied this "public figure-private individual" distinction in *Time Inc.* v. *Firestone*, 424 U.S. 448 (1976).

In the present case much of the dispute centers on the meaning of *Gertz* and *Firestone* insofar as those decisions bear on the question whether Ilya Wolston qualifies as a public figure. Unfortunately, the line between "public" and "private" libel plaintiffs is not altogether clear, *see Firestone*, 424 U.S. at 484-93 (Marshall, J., dissenting), and the question here has therefore proved difficult to resolve. To do so, the court has had to consider the reasons why petitioner Gertz and respondent Firestone were found to be private individuals, not public figures.

The facts in *Gertz* are these: After a Chicago policeman was convicted of murder, the victim's family retained petitioner Gertz, a reputable attorney, to represent them in civil litigation against the convicted policeman.

Respondent's magazine then printed an article alleging that the prosecution had gained a conviction of the policeman on the basis of false testimony, that the murder trial was part of a Communist plan to discredit the police, that Gertz had participated in designing the "frame-up," and that Gertz served as a "Communist-fronter" and had a criminal record. In fact, the Court noted, Gertz had played no part whatever in the policeman's criminal trial and had no record of his own. He did attend the coroner's inquest into the boy's death but never discussed either the criminal or civil litigation with the press. 418 U.S. at 352.

Justice Powell's opinion for the majority of the Court recognizes two categories of public figures:[21]

> "In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions."

418 U.S. at 351. Although this language suggests that a person can become a public figure by being "drawn into" the public view, elsewhere in the opinion the Court made clear its emphasis on purposeful activity by which a person can be said to have breached his privacy himself and thereby to have increased the risk to his reputation:

> "Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare. . . .

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[21] In *Curtis Publishing Co.* v. *Butts*, and its companion, *Associated Press* v. *Walker*, 388 U.S. 130, 154-55 (1967), Justice Harlan had also recognized two categories of public figures—those who command a substantial amount of independent public interest at the time of the publication, attained through position alone or by purposeful activity amounting to a thrusting of one's personality into the vortex of an important controversy.

> . . . [P]ublic figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them."

418 U.S. at 345. Gertz, reasoned the Court, clearly did not qualify as a public figure for all purposes since he had achieved no general fame or notoriety in the community. *Id.* at 351-52. Moreover, the "nature and extent of . . . [Gertz's] participation in the particular controversy giving rise to the defamation" failed even to qualify him as a public figure for a limited range of issues. *Id.* at 352. Since he played no part in the criminal prosecution, never communicated with the press regarding either the criminal or civil litigation, and, essentially, participated in the controversy only to the extent necessary to represent his clients' interests, he "plainly did not thrust himself into the vortex of this public issue, nor did he engage the public's attention in an attempt to influence its outcome." *Id.* Thus, under the Court's rationale, it would be improper to conclude that he had "relinquished . . . [any] part of his interest in the protection of his own good name." *Id.* at 345.

In *Firestone*, the Court's most recent decision concerning the line between public figures and private individuals, respondent was the wife of the scion of one of America's wealthiest industrial families. In determining that she did not qualify as a public figure, even for the limited range of issues relating to her highly publicized divorce proceeding,[22] the Court emphasized the absence of "voluntariness" as its basis for concluding that respondent had not sacrificed her interest in protecting her reputation. For the privilege to attach, the Court reasoned, the defamatory communication must concern a "public controversy;" but respondent's divorce proceeding, albeit an object of curiosity, was not the sort of controversy the Court had in mind. 424 U.S. at 454. Moreover, said the Court, the allegedly defamed individual must have voluntarily exposed herself to increased risk of defamatory

[22] After Mrs. Firestone sued her husband for separate maintenance, her husband filed a counterclaim for divorce. The Florida Supreme Court characterized the trial as a "cause célèbre." 424 U.S. at 454.

injury; but for respondent, "resort to the judicial process . . . [was] no more voluntary in a realistic sense than that of the defendant called upon to defend his interests in court." *Id.*, quoting from *Boddie* v. *Connecticut*, 401 U.S. 311, 376 (1971). Rather, if she was to obtain separate maintenance, she had no choice but to go to court. 424 U.S. at 454. And even though she had held press conferences during the much publicized divorce proceeding, "she did not thrust herself to the forefront of any particular public controversy in order to influence the resolution of the issues involved in it." *Id.* at 453.

III. APPLICABILITY OF THE CONSTITUTIONAL STANDARD

Ilya Wolston apparently led a thoroughly private existence and was generally unknown before receiving his first subpoena, early in 1957, and after that as well, until his failure to appear before the special grand jury became public knowledge. After the flurry of publicity attending his conviction ceased, he apparently succeeded, for the most part, in resuming his private ways. Accordingly, defendants make no claim that his contempt conviction achieved for him pervasive fame or notoriety[23] or that he wields the sort of power and influence that would otherwise qualify him as a public figure for all purposes and in all contexts. Rather, the question here is whether Wolston's failure in 1958 to testify before the grand jury investigating espionage and his resultant contempt conviction qualify him as a public figure for a limited range of issues. As defendants have put it, the question is whether Wolston is a public figure for purposes of comment on his connection with, or involvement in, Soviet espionage in the United States.

[23] In assessing Wolston's "notoriety," this court limits itself to consideration of his contempt conviction and subsequent coverage of that conviction. For if, as Wolston contends, allegations that he was a Soviet agent are libelous, then any notoriety springing from those allegations has no bearing on the issue here. The Supreme Court's decisions require purposeful activity on plaintiff's part; thus libel alone—particularly the very libel on which a lawsuit is based—cannot rob a person of his status as a private individual.

Wolston derives from *Gertz* and *Firestone* the proposition that only a select few libel plaintiffs qualify for constitutional purposes as "limited-issue" public figures. Those, he says, are people who have purposefully sought the public's attention in order to sway public opinion; people who have "mounted a public rostrum, made an appeal to the public, sought or received public funds, offered a service or product for public use or comment, or organized a boycott or other group activity by other members of the public." *Afro-American Publishing Co.* v. *Jaffe*, 366 F.2d 649, 658 (D.C. Cir. 1966). But the last thing Wolston wanted, according to him, was to engage the public's attention or to influence anyone in any way whatever. Relying on language in *Gertz*, Wolston contends "he has never thrust himself to the forefront of any controversy. Nor has he had the power of influence to resolve any public debate." Brief for Plaintiff at 10. Moreover, he claims, *Firestone* "made it clear that merely being a party to civil litigation or being brought before the court as a criminal defendant does not work a metamorphosis transforming a private person into a public figure." Brief for Plaintiff at 11. In this connection Wolston observes that his "first and only public appearance" occurred in a courtroom and that he appeared there only "at the behest of the state." *Id.* at 10-12. He also claims that even if his actions in 1958 did qualify him as a public figure for purposes of comment at the time, it can scarcely be said that he was in any sense a public figure in 1974, when defendants published *KGB*. Finally, he reasons, the privilege is designed to protect reporters and the news media, not defendants such as these who had ample time to investigate any potentially libelous statements they intended to publish.

The court finds Wolston's arguments eloquent and well-reasoned.[24] It cannot agree, however, with his literal, restrictive interpretations of *Gertz* and *Firestone*. To be

[24] Wolston's conceptualization of a public figure is appealing, since the people he describes—individuals with power to attract the public's attention in order to influence the resolution of important issues—are, but for lack of public office, similar to public officials. Thus it is easy to conclude that they can claim a lesser

sure, those cases narrow the privilege articulated by the plurality in *Rosenbloom*. Indeed, the Supreme Court has seen fit to turn inside out the rule espoused in *Rosenbloom* by concluding that private individuals generally do *not* become public figures solely by virtue of involvement, however slight, in matters of general or public concern. Nevertheless, this court is not convinced that the Supreme Court means to limit public-figure status to persons with power and influence or, for that matter, even to persons who have purposefully sought to engage the public's attention. Rather, as the Court said in *Gertz*, "[i]t is preferable to reduce the public-figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation." 418 U.S. at 352. *See also Ryder* v. *Time, Inc.*, Civil No. 76-1909 (D.C. Cir. 1976), slip opinion at 5. And the nature of an individual's participation might be significant, and the extent substantial, whether or not he actually craves the public's attention or wields power and influence. Thus, for example, one individual might seek to remain a recluse, and yet, by virtue of his power and influence, qualify as a public figure. And by the same token, a virtual nonentity desiring no attention at all may, by engaging in activity that appears to affect the public's well-being, qualify as well. In each case the public has a legitimate interest in knowing about the individual's activities, and he can be said to have sacrificed a measure of his interest in protecting his reputation. For there are many ways by which a person can "mount the public rostrum," and when one does so the privilege must arise. This is so because we have embraced a "profound national commitment to the principle that debate on *public issues* should be uninhibited, robust, and wide-open," *New York Times*, *supra*, 376 U.S. at 270 (emphasis added); and because that debate necessarily encompasses discussion about the activities of individuals who assume

interest in protecting their reputations than that of private individuals. The public has an inense interest in knowing about such people in order better to assess the positions they espouse, and the media therefore require "breathing space" in criticizing them.

central or prominent roles in the unfolding of those issues.

In this court's opinion, *Gertz* contemplates two principle considerations in determining whether a person qualifies as a limited-issue public figure.[25] First, the plaintiff must have become involved in a "public controversy;"[26] if he has not done so, the First Amendment interest at stake is insubstantial. Although the Supreme Court has not explained exactly what it means by this concept,[27] *Firestone* seems to indicate that matters which are essentially private, such as the issues in a divorce proceeding, do not become public for purposes of libel law solely because they are aired in a public forum.[28] Thus, although divorce itself may be an important subject of debate, discussion of the details of

[25] *See Martin Marietta Corp.* v. *Evening Star Newspaper*, 417 F. Supp. 947 (D.D.C. 1976).

[26] In *Gertz* the Court rejected the *Rosenbloom* plurality's determination that "public concern" constituted a sufficient basis for mandatory application of the actual malice test. In both *Gertz* and *Firestone*, however, the Court seemed to regard a "public controversy" as a prerequisite for mandatory application of the test—that is, there must exist a controversy into which the putative public figure can have thrust himself.

[27] The Court has employed similar language on several occasions. In *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967), Justice Harlan spoke of an "*important* controversy," but provided no criteria for gauging "importance." *Id.* at 155 (emphasis added). In *Rosenbloom* v. *Metromedia*, 403 U.S. 29 (1971), the plurality spoke of areas of "*general or public interest*," but provided no standards for measuring that "interest." Id. at 43 (emphasis added). In *Gertz*, the Court sought to relieve courts of the responsibility for determining the public interest in the context of libel suits, but nonetheless referred to a "public figure" as an individual who involves himself in a "*public controversy*." 418 U.S. at 351. In *Firestone*, the Court provided little further guidance, saying only that "[d]issolution of a marriage through judicial proceedings is not the sort of 'public controversy' referred to in *Gertz*, even though the marital difficulties of extremely wealthy individuals may be of interest to some portion of the reading public." 424 U.S. at 454.

[28] The Court said that *Gertz* "should make it clear that no such blanket privilege for reports of judicial proceedings is to be found in the Constitution." 424 U.S. at 456.

particular divorces generally does little to advance that debate and therefore does not require the degree of insulation from suit accorded by the standard in *New York Times*. Simply stated, it is not necessary to treat every participant in a divorce proceeding as though he or she were a public figure. Second, the plaintiff's involvement in the controversy must have been in some sense voluntary, as well as significant. The Constitution, according to the Supreme Court, respects the states' interest in protecting the reputation of a person who has done nothing—or very little—to sacrifice it himself. Rarely, therefore, does the Constitution require the states to attach public-figure status to the mere act of entering the doors to the courthouse. For most litigants, like respondent Firestone, have no other means of obtaining redress; if she wanted separate maintenance, she had no alternatives but to go to court.[29] And petitioner Gertz, by providing counsel to the victim's family, played at most a supporting role in the controversy over the conduct of Chicago's police. Neither of them, accordinging to the Court, sacrificed any interest he otherwise had in protecting his reputation.

It is the court's opinion that Ilya Wolston does qualify under *Gertz* and *Firestone* as a public figure[30] for the limited purpose of comment on his connection with, or involvement in, espionage in the 1940's and '50's. This

[29] The Supreme Court's opinion proceeds on the assumption that Mrs. Firestone had no alternative: "Nor did respondent freely choose to publicize issues as to the propriety of her married life." 424 U.S. at 454.

[30] The court notes that it regards the determination of public-figure status as a question of law, which the court, not the jury, must resolve. In *Rosenblatt* v. *Baer*, 383 U.S. 75 (1965), the Supreme Court observed that, "as is the case with questions of privilege generally, it is for the trial judge in the first instance to determine whether the proofs show respondent to be a 'public official.'" *Id.* at 88. "Such a course will both lessen the possibility that a jury will use the cloak of a general verdict to punish unpopular ideas or speakers, and assure an appellate court the record and findings required for review of constitutional decisions." *Id.* at 88n. 15. In accord in the public-figure context, *Rosanova* v. *Playboy Enterprises, Inc.*, 411 F. Supp. 440 (S.D. Ga. Sav. Div. 1976); *Hotchner* v. *Castille-Puche*, 404 F. Supp. 1041 (S.D.N.Y. 1975).

is so essentially because he involved himself in the espionage controversy in a way that unquestionably invited attention and comment. Indeed, a contempt conviction for failure to appear before a grand jury investigating espionage invites press and public alike to ask the very questions which the alleged libel in this case purports to answer, namely: "Why did he fail to appear? What was his connection with the investigation?" Refusal to extend the constitutional privilege to answers to those questions which the press believes to be true (or about which it has no serious doubts) would serve to muzzle, rather than to encourage, the debate which the First Amendment is designed to foster.

Applying the considerations articulated in *Gertz* and *Firestone*, the court has no doubt whatsoever that espionage qualifies as a "public controversy," however that concept might be defined. For the issues espionage embraces are public ones in every respect. This is so not merely because of the importance of the subject to the public; this is so also because full airing of the subject necessarily requires discussion of the activities of the particular people who involved themselves with espionage in a significant way. And the list surely includes people convicted of contempt in an espionage setting, as well as people convicted of espionage itself. Moreover, although the question is a more difficult one,[31] the court is persuaded that, in choosing not to appear before the grand jury, Wolston breached his privacy himself and thereby relinquished a measure of his interest in protecting his reputation. To be sure, he probably would have preferred not to have become involved in the controversy in the first place; a subpoena interrupted his private existence in Washington, D.C. But the subpoena did not require Wolston to appear in public; on the contrary, compliance

[31] In *Anderson* v. *Stanco Sports Library, Inc.*, Civil No. 75-2031 (4th Cir. 1976), the court, noting the complexity of the issue, managed to avoid determining whether a convicted murderer qualifies as a public figure. *Compare Rosanova* v. *Playboy Enterprises, Inc.*, 411 F. Supp. 44 (S.D. Ga. Sav. Div. 1976), where the court based a finding that Tony Rosanova is a public figure on his alleged underworld involvements and his contacts with the Teamster's Union.

with it might have enabled him to have preserved his anonymity.[32] In choosing not to comply, Wolston knew, or certainly should have known, that he would attract attention—again, precisely the sort of attention that he challenges in this case.[33] He cannot now be heard to

[32] Grand jury proceedings are insulated from the public's view *See* Rule 6(e), Fed. R. Crim. P., which continues the traditional practice of requiring participants in grand jury proceedings, with the exception of witnesses, to refrain from discussing those proceedings with the public. Secrecy has long been the federal policy and was the rule at the time of Wolston's contempt trial. *See, e.g., Goodman* v. *United States*, 108 F.2d 516 (9th Cir. 1940). Thus it would be incorrect to say that Wolston was compelled—by the subpoena at least—to appear in a public forum. Accordingly, from January 1, 1957 to June 30, 1958, the period in which he testified on several occasions before the grand jury, he apparently received no publicity at all. Deposition of Ilya Wolston at 62-72.

[33] In Wolston's affidavit he describes extenuating circumstances, such as problems with his health, which he claims bore on his failure to travel to New York to testify on July 1, 1958. From this evidence the court could infer that Wolston's decision not to appear was in some sense involuntary, that in fact he had no desire whatever to sacrifice the grand jury's cloak of secrecy but was forced to do so by circumstances beyond his control. In Defendant's Reply Memorandum they seek in turn to show that Wolston intentionally thwarted the Government's investigation, and go so far as to submit an affidavit that an Assistant United States Attorney executed in 1958 in support of the Government's motion to hold Wolston in contempt.

The court is not persuaded that such considerations have any bearing on the issue before it. For one thing, the federal judge who accepted Wolston's guilty plea presumably passed on the question of "voluntariness," and this court sees no reason why it should examine his findings. More importantly, the court is persuaded that "subjective" or actual voluntariness ought not to be a factor in the determination whether a particular libel plaintiff qualifies as a public figure. As the Supreme Court observed in *Gertz*, "the communications media are *entitled to act on the assumption* that . . . public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them." 418 U.S. at 345 (emphasis added). And inasmuch as the media have no way of ascertaining with certainty—much less of proving—the actual thought processes of a putative public figure but instead must rely on objective indicia of his intentions, and the public's interest in knowing about his activities might be substantial regardless of his intentions, the standard must be an objective one. The concept of breathing space is simply incompatible with a test that

complain that someone noticed him, unless he can prove actual malice. For answers to the questions raised by Wolston's conviction, whether right or wrong, fall within the ambit of the constitutional privilege. As the Supreme Court has observed repeatedly, the freedoms of speech and press embodied in the First Amendment could not be fully realized and preserved if the press were obliged either to guarantee the truth of its assertions, or to refrain from making them.

Wolston's other arguments—that he is no longer a public figure and that the privilege belongs only to the press, not to the authors and publishers of a book—are unavailing. Surely historical comment on the espionage-related activities of Wolston and others who became involved in the controversy during the 1950's requires just as much protection as did media coverage of the events

forces the media either to comprehend a person's motives, or to refrain from commenting on his actions. Normally, then, in the context of the First Amendment the press must be entitled to assume that an individual's acts are voluntary unless it has good reason to believe otherwise. If, moreover, an individual engages in activity that reasonably appears to constitute a breach of his privacy and to involve him in a controversy that is essentially public in nature, the privilege will arise. To be sure, these concepts are general at best and the press might find it difficult to resolve the questions they raise in particular cases. Nevertheless, the distinctions between *Firestone* and Wolston's case seem fairly clear. In *Firestone*, which the Court saw fit to treat essentially as an "ordinary" divorce, the Court determined that an individual ordinarily does not sacrifice any part of his interest in protecting his reputation simply by bringing a marital dispute to court. As suggested previously, such disputes involve issues that are essentially private in nature, and the participants have no other means of seeking relief. By contrast, it is not difficult to conclude that Wolston did sacrifice a measure of his interest in protecting his reputation by subjecting himself to contempt charges and pleading guilty. In no sense did the Government compel him to remain at home on July 1, 1958. He might instead have chosen to comply with the subpoena or, like respondent Firestone, to go to court to vindicate whatever he may have had not to comply with it. When he failed to choose either of these alternatives, he became involved in a controversy of a decidedly public nature in a way that invited attention and comment, and thereby created in the public an interest in knowing about his connection with espionage that outweighed his competing interest in remaining anonymous.

as they occurred. The Constitution does not confine debate on public issues and the roles of people involved in them to discrete and brief periods of time.[34] Moreover, the need hurriedly to print "hot news" [35] is but one of the rationales supporting the public-figure concept. Authors and publishers of books, like their news-media counterparts, are simply unable to guarantee the truth of each and every word they print.[36] To be sure, they

[34] In *Brewer* v. *Memphis Pub. Co., Inc.*, 538 F.2d 699 (5th Cir. 1976), the court of appeals observed that the Supreme Court's decisions leave open the question whether a "person who has been a public figure in the past can retreat to private status and obtain the lesser standard of proof required for damages for injury from libel." *Id.* at 703. The court of appeals remanded the case to the trial court to resolve this issue as well as others.

However, in *Time* v. *Johnson*, 448 F.2d 378 (4th Cir. 1971), the court stated that:

> "Mere passage of time will not necessarily insulate from the application of *New York Times* v. *Sullivan*, publications relating to the past public conduct of a then "public figure." No rule of repose exists to inhibit speech relating to the public career of a public figure so long as newsworthiness and public interest attach to events in such public career."

Id. at 381.

[35] The "hot news" rationale is misleading. This is so because the argument that the press must act quickly (and therefore lacks time to investigate) while the author of a book has plenty of time (and therefore can investigate extensively) seems, at first blush, to be a persuasive reason for requiring authors of books to act reasonably, or at least not too unreasonably. But the argument misses the point. Indeed, were "hot news" the only, or even the dominant, consideration, even *New York Times* might have been decided differently. There is nothing inherently unreasonable about quick decisions; the Court might have decided to require the press simply to conduct a reasonable investigation under the circumstances, e.g. the time available, the risk to reputation, and so on. Instead, the Court saw fit to require no investigation whatsoever in *New York Times*, a case involving an advertisement, not a "hot news" item.

The point, very simply, is that the strictures of objective reasonableness are incompatible with vigorous commentary on the public activities of public officials and public figures, whether the commentator is the press or the author of a book.

[36] In *Meeropol* v. *Nizer*, 381 F. Supp. 29 (S.D.N.Y. 1974), the court found that the sons of Julius and Ethel Rosenberg were public figures notwithstanding the fact that the children had "renounced

may well have greater opportunity to investigate the truth of their assertions, and this might bear on a finding of actual malice. But to impose on them the burden of acting as would a reasonably prudent person under the circumstances—under either a negligence or gross negligence standard—would doubtless lead to destructive self-censorship. For reasonable people might differ about the amount of time, money, and manpower necessary to complete an adequate investigation, and these differences could become either the bases for a host of lawsuits or for decisions not to publish. Insofar as public figures are concerned, the Constitution accords breathing space to publishers in order to avoid these results and, instead, to encourage publishers not to refrain from printing criticism unless they know it is false or have serious doubts about the truth of it.[37]

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the public spotlight by changing their name." *Id.* at 34. The alleged libel appeared in Nizer's book *The Implosion Conspiracy*, yet the court's opinion makes no mention of the question whether authors and publishers of books can claim the protection afforded by the actual-malice standard. Implicitly, of course, the court resolved that question in favor of the defendants.

[37] The court might also have decided to apply the actual-malice standard in this case on the ground that the law in the District of Columbia requires it. In *Hatter* v. *Evening Star Newspaper Co.*, Civil No. 8298-75 (Sup. Ct. D.C. March 15, 1975), a Superior Court Judge observed that state courts may, under *Gertz*, establish lesser standards of fault in libel suits and nevertheless saw fit to embrace the *New York Times* standard in a suit concerning a "private individual" who became involved in a matter of "public concern." Surely Wolston would be required to prove actual malice under this test. And whether or not the *Erie* doctrine is mandated in diversity actions brought in the District of Columbia, *see Martin Marietta Corp.* v. *Evening Star Newspaper*, 417 F. Supp. 947, 957 n.9 (D.D.C. 1976); *Luck* v. *Baltimore & Ohio R.R.*, 352 F. Supp. 331, 334 (D.D.C. 1972), or in an area of substantive law to which the highest state court has not spoken, this court, believing that the Superior Court has adopted the best available rule, would have followed that court's lead were it necessary to do so.

IV. APPLICATION OF THE CONSTITUTIONAL STANDARD

The court of appeals for this jurisdiction has observed that summary procedures are especially appropriate in the First Amendment area, *Washington Post Company* v. *Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1011 (1967). For the *New York Times* principle is designed in part to avoid the "chilling effect" on freedom of speech and press that inheres in the threat of being put to the defense of a lawsuit. *Id.*; *see also Dombrowski* v. *Pfister*, 380 U.S. 479, 487 (1965). Accordingly, defendant's motion should be granted if plaintiff is unable to establish clearly and convincingly that defendants acted with actual malice. *See, e.g., Miller* v. *News Syndicate Co.*, 445 F.2d 356 (2d Cir. 1971); *Bon Air Hotel, Inc.* v. *Time, Inc.*, 426 F.2d 858 (5th Cir. 1970); *Washington Post Co.* v. *Keogh*, 365 F.2d 965 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1011 (1967).

The Supreme Court has dealt with the concept of actual malice on a number of occasions, and the concept is now well-defined. Thus, actual malice is quite different from commonlaw malice, which is generally required under state tort law to support an award of punitive damages and which focuses on the defendant's attitude toward the plaintiff. Actual malice focuses instead on the "defendant's attitude . . . toward the truth or falsity of the material published." *Cantrell* v. *Forest City Publishing Co.*, 419 U.S. 245, 252 (1974); *Time, Inc.* v. *Hill*, 385 U.S. 374, 396 n.12 (1967). In *New York Times* the Court defined the requisite attitude as either knowledge that the statement was false or reckless disregard for the truth or falsity of the statement. 376 U.S. at 280. In subsequent cases the Court has made clear that the issue focuses on the defendant's state of mind. In *Garrison* v. *Louisiana*, 379 U.S. 64, 74 (1964), the Court stated that plaintiff must demonstrate a "high degree of awareness of . . . probable falsity." And in *St. Amant* v. *Thompson*, 390 U.S. 727 (1968), the Court observed:

> "[R]eckless conduct is not measured by whether a reasonably prudent man would have published, or

> would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant *in fact entertained serious doubts* as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice."

Id. at 731 (emphasis added).

The record in this case fails to demonstrate clearly and convincingly that Barron or any of his co-defendants entertained serious doubts or, for that matter, any doubts about the truth of the statements in *KGB* that connect Wolston with espionage. Rather, Barron has stated under oath that he "was confident upon publication of *KGB* that the book as a whole and each and every statement in it were true, and . . . was aware of no fact that tended to make . . . [him] doubt the truth of the book or of any statement in it," Affidavit of John Barron at 2; and the record contains scarcely any evidence at all tending to impeach Barron's assertions. To be sure, sworn-to reliance on a report by the F.B.I. might seem, in light of events in recent years, to be risky business. But reliance on an F.B.I. report, absent an independent basis for entertaining serious doubts about its accuracy, falls far short of the level of questionable activity necessary to raise a genuine issue with regard to actual malice. *Compare, e.g., Carson* v. *Allied News Co.*, 529 F.2d 206 (7th Cir. 1976); *Airlie Foundation, Inc.* v. *Evening Star Newspaper Co.*, 337 F. Supp. 421 (D.D.C. 1972). *See also Briscoe* v. *Reader's Digest Association, Inc.*, No. LTL 71-245 (C.D. Cal. 1972) (unpublished order granting summary judgment to defendants who relied on an F.B.I. report of a hijacking incident involving plaintiff Briscoe). And Barron's knowledge of Soble's reputation as a liar is too slender a reed to support a judgment in Wolston's favor. Without reference to Soble the F.B.I.'s report categorically identifies Ilya Wolston on page 24 as a "Soviet intelligence agent;" at page 26 the report states that the Government had information supporting "the probable identification of Wolston as a Soviet agent" as early as 1951, well before Soble was arrested. And

in any case, even if Soble was directly or indirectly the Government's only source of information concerning Wolston, Barron knew that, *after* Soble was arrested, he provided information to the Government that proved "extremely useful and . . . quite reliable in many cases." Deposition of John Barron at 73. Moreover, and perhaps most important, despite the fact that Barron devoted over four years to researching and writing *KGB*, and did so with the assistance of a sizeable research staff, *id.* at 45-48, not a shred of evidence emerged suggesting that Wolston had ever objected to the assertions about him in Morros's book, published in 1959, or in the F.B.I.'s report, published in 1960.[38] Under the circumstances, the court is satisfied not only that Barron did place his faith in the accuracy of the report, but also that he had ample reason to do so notwithstanding his awareness of the reputation for untrustworthiness which Soble had earned while acting as an undercover intelligence agent.

The court agrees with Wolston that the footnote at page 188 of the Reader's Digest edition of *KGB* appears to state falsely that he was indicted for espionage. Nevertheless, the statement is ambiguous; Barron's explanation of it is plausible and, in the court's opinion, offered in good faith. *See St. Amant* v. *Thompson*, 390 U.S. 727, 732 (1968); *Time Inc.* v. *Pape*, 401 U.S. 279 (1971). In such circumstances this court has recently said:

> "In the absence of any proof, other than the document itself, that defendants entertained serious doubts about the possibility of a defamatory interpretation, plaintiff's case is not one of 'convincing clarity,' as is constitutionally required. The language in the editorials, itself ambiguous and susceptible of different interpretations, cannot render the defendants' statements of good faith belief 'so inherently

[38] In his deposition Wolston states that he learned of the F.B.I.'s report only recently, was unaware of Morros's book until the late 1960's, and remained silent about the latter out of concern for making matters worse. Deposition of Ilya Wolston at 91. None of this has any bearing, of course, on Barron's belief that the F.B.I.'s report is accurate.

improbable that only a reckless man would have so worded the editorials.' "

Buckley v. *Washington Post Co.*, Civil No. 74-1203 (D. D.C. June 29, 1976), slip opinion at 7. Thus, even though the court in *Buckley* agreed with plaintiff that the publication in question there was susceptible to a defamatory interpretation, it granted summary judgment to the defendants. For the publication did not "unambiguously state . . . the contrary of what defendant said he meant," *id.* at 9, and therefore could not by itself support a finding of actual malice. That principle is applicable here as well.

Finding no genuine issue raised with respect to actual malice on Barron's part, the court must grant his motion for summary judgment. The court must also grant summary judgment to each of the other defendants, since there is no basis in the record for concluding that any of them had serious doubts about the truth of the statements they published concerning Wolston.

It is so ordered.

/s/ William B. Bryant
United States District Judge
January 31, 1977

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 77-1329

ILYA WOLSTON, APPELLANT

v.

THE READER'S DIGEST ASSOCIATION, INC., ... d/b/a Reader's Digest Press, ET AL.

Appeal from the United States District Court for the District of Columbia

(D.C. Civil 75-459)

Argued February 15, 1978

Decided May 23, 1978

Sidney Dickstein with whom *Stephen G. Kozey* was on the brief for appellant.

John J. Buckley, Jr., with whom *John W. Vardaman, Jr.* was on the brief for appellees.

Before: ROBINSON, MACKINNON and ROBB, *Circuit Judges*

Opinion for the Court filed by *Circuit Judge* ROBB.

ROBB, *Circuit Judge*: In this action for libel Ilya Wolston sues the author, John Barron, and the publishers of a book entitled "KGB: The Secret Work of Soviet Secret Agents". The defendant The Reader's Digest Association, Inc. (Reader's Digest) is the initial publisher and the defendants Bantam Books, Inc., Book-of-the-Month Club and MacMillan Book Clubs, Inc., are subsequent publishers

under contract arrangements with Reader's Digest. The District Court granted summary judgment for the defendants. *Wolston* v. *Reader's Digest Ass'n*, 429 F. Supp. 167 (D.D.C. 1977).

Wolston is the nephew of one Jack Soble who in April 1957, in United States District Court for the Southern District of New York, pled guilty to an indictment charging espionage. On the same day his wife Myra Soble also pled guilty to this offense. In October 1957 they were sentenced to the penitentiary.

The grand jury investigation of espionage continued after the indictment of the Sobles. Wolston was subpoenaed to appear before the grand jury in New York and he did appear on several occasions. On July 1, 1958 he failed to appear. As a result, in August 1958, he was charged with criminal contempt and on his plea of guilty was placed on probation for three years conditioned on his being available to process of the court within that period. The contempt proceeding generated some fifteen newspaper stories in the District of Columbia, where Wolston lived, and in New York. Thereafter, in 1959, Wolston's name appeared in a book entitled "My Ten Years As a Counterspy", written by Boris Morros, a former confederate of Soble. According to Morros, Soble identified Wolston to him as a Soviet agent who had furnished Soble information. Wolston was also identified as a Soviet agent in an FBI Report "Expose of Soviet Espionage", published in 1960 by the Senate Internal Security Subcommittee of the Committee on the Judiciary, United States Senate.

KGB was first published in January 1974. The alleged libel appears in the following passage in *KGB*, referring to disclosures by "royal commissions in Canada and Australia, and official investigations in Great Britain and the United States":

> Among Soviet agents identified in the United States were Elizabeth T. Bentley, Edward Joseph Fitzgerald, William Ludwig Ullmann, William Walter Remington, Franklin Victor Reno, Judith Coplon, Harry Gold, David Greenglass, Julius and Ethel Rosenberg, Morton Sobell, William Perl, Alfred Dean Slack, Jack Soble, *Ilya Wolston*, Alfred and Martha Stern.*
>
> * No claim is made that this list is complete. It consists of Soviet agents who were convicted of espionage or falsifying information or perjury and/or contempt charges following espionage indictments or who fled to the Soviet bloc to avoid prosecution. [Emphasis supplied][1]

The District Court granted summary judgment for the defendants upon the ground that Wolston was a public figure for the limited purpose of comment on his connection with, or involvement in, espionage, and that the evidence raised no genuine issue with respect to the existence of actual malice on the part of the defendants. We affirm.

PUBLIC OR PRIVATE FIGURE— A QUESTION OF LAW

The District Court held that whether Wolston was a public figure was a question of law, to be decided by the court. Wolston contends that in this the court erred because "this complex factual question . . . . whether plaintiff is a public figure is properly a jury matter." We think the District Court was right. In *Rosenblatt* v. *Baer*, 383 U.S. 75, 88 (1966) the Court remarked that "as is the case with questions of privilege generally, it is for the trial judge in the first instance to determine whether the proofs show respondent to be a 'public official' ". We think the same rule should be applied when the question is whether a plaintiff is a "public figure". The Court observed "[s]uch a course will both lessen the possibility that a jury will use the cloak of a general verdict to punish unpopular ideas or speakers, and assure an appellate court the record and findings required for review of constitutional decisions." 383 U.S. 88 n.15. We add that a jury of laymen is hardly qualified to apply the nice and sometimes intricate distinctions be-

[1] Wolston also complains of the index to the book which lists him as Wolston, Ilya, Soviet Agent in U.S.

tween public and private figures which have been developed in the cases following *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964). Application of those rules and distinctions is anomalous to a court's ruling on the question of probable cause for a search and seizure, a matter which of course is for the court and not the jury. We note furthermore that counsel is unable to cite any case in which a jury has been permitted to decide whether a plaintiff, as a matter of "constitutional fact", is a public figure. On the contrary, the question has always been held to be one for the court. *See Hotchner* v. *Castillo-Puche*, 404 F. Supp. 1041, 1043-47 (S.D.N.Y. 1975) (order denying summary judgment).[2]

Wolston argues that there was an issue of fact concerning his intention in failing to appear before the grand jury and in subjecting himself to a contempt proceeding. The issue he says was whether in so doing he intended to mount a public rostrum and to participate in the debate concerning espionage investigations. We conclude however that the undisputed facts demonstrate that he became a public figure, whatever his subjective intention might have been. We therefore turn to a consideration of the undisputed facts.

WOLSTON A PUBLIC FIGURE

The plaintiff Ilya Wolston was born in Russia in 1918 and later lived in Lithuania, Germany, France, and England. In 1939 he came to the United States and in 1943 became a naturalized citizen. He was drafted into the United States Army in 1942, trained as a Russian interpreter, and served primarily in Alaska as a liaison to Soviet military personnel. After his discharge in 1946, he worked as an interpreter for the United States Military Government and the Department of State in Allied-occupied Berlin. On his return to the United States in 1951, Wolston first worked as a clerk, then enrolled in

[2] A judgment for the plaintiff in this case was reversed but the District Court's ruling on his status as a public figure was not disturbed. Hotchner v. Castillo-Puche, 551 F.2d 910, 911 (2d Cir.), *cert. denied*, 98 S.Ct. 120 (1977).

an undergraduate program, and in 1955 moved to Washington, D.C. to work for several months for the Army Map Service and finally as a free-lance translator until 1957.

On January 25, 1957 Wolston's aunt and uncle, Myra and Jack Soble, were arrested on espionage charges by agents of the Federal Bureau of Investigation. They were indicted on February 4, 1957 on five counts charging espionage, conspiracy, and violation of the Registration Acts. In April 1957 Jack Soble pled guilty to espionage and was sentenced to imprisonment for seven years. On the same day the Sobles were arrested, Wolston was interviewed at his home by the F.B.I. Shortly thereafter he was subpoenaed to appear before a federal special grand jury convened in the Southern District of New York, to investigate the activities of Soviet intelligence agents in the United States. Wolston was interviewed by the F.B.I. on at least three more occasions in connection with the grand jury's investigation and he made trips to New York in response to subpoenas.

On July 1, 1958 Wolston failed to respond to a grand jury subpoena directing him to appear on that date. On July 14, 1958 a federal district judge ordered that Wolston show cause why he should not be held in criminal contempt of court. These events immediately attracted a significant amount of public attention and coverage by newspapers. On July 15 and 16, at least seven news stories were published in New York and Washington, D.C., newspapers, focusing on Wolston's failure to appear and the court's show cause order. The stories were headlined "Spy Inquiry Hunts Nephew of Soble," "Hunt Soble Kin for Spy Data," "Soble Nephew Facing Jail in Spy Quiz Snub," "Soble Nephew Faces Rap for Probe Dodge," "Court Calls Spy's Nephew," and "Kin of Soble Faces Quiz on Contempt." (App. 270-271, 273-275, 280-281) The stories reported statements by Assistant United States Attorney Herbert C. Kantor that Wolston had been in contact with the Sobles for a long time before their arrest in January 1957. Three of the stories reported a statement by Mr. Kantor that Wolston was believed to have material information about the espionage matters

under investigation, described in one story quoting Kantor as a "general criminal conspiracy against the U.S." (App. 274) The stories noted that Wolston had served as an interpreter at the U.N. conference in San Francisco, for the military government in Germany and in the Office of the United States High Commissioner of Germany.

On July 29, 1958 at least two newspapers reported that the judge presiding at the contempt hearing commented that "there is no question in my mind that there was a studied attempt [by Wolston] to avoid [an] appearance before this grand jury." (App. 279, 284) Three newspaper stories reported Mr. Kantor's statement that Wolston had previously failed to appear in answer to five different subpoenas, each time submitting a doctor's certificate the day before his scheduled appearance. In the subsequent contempt proceeding, Mr. Kantor submitted an affidavit stating that Wolston had failed to appear on several prior occasions in response to subpoenas.

On August 7, 1958 Wolston pled guilty to the charge of criminal contempt of court, and on August 8, his guilty plea was reported in two newspapers. On August 13, Wolston received a one-year suspended sentence on his guilty plea, and he was placed on probation for three years on condition that he be available to appear before another espionage grand jury if one were convened. The following day, August 14, three newspapers reported the sentence and the probation terms. One headline read "Sets Soble Kin Free—If He'll Talk on Spies". (App. 277)

The District Court held that under the standards of *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974) and *Time, Inc.* v. *Firestone*, 424 U.S. 448 (1976) Wolston qualified "as a public figure for the limited purpose of comment on his connection with, or involvement in, espionage in the 1940's and '50's". 429 F. Supp. at 176. [footnote omitted] We agree. By failing to appear before the grand jury Wolston invited public attention and comment. Until that failure occurred he enjoyed obscurity in the wings, but by subjecting himself to a citation for contempt he voluntarily stepped center front into the spotlight focused on the investigation of Soviet espionage. In short, by his voluntary action he invited attention and

comment in connection with the public questions involved in the investigation of espionage. The reference to him in *KGB* related strictly to those issues, without intruding into his personal life or affairs. *Cf. Time, Inc.* v. *Johnston*, 448 F.2d 378, 381 (4th Cir. 1971). Any contention that his appearance on the stage was involuntary is conclusively answered by his conviction for contempt.

KGB was published in 1974, sixteen years after Wolston's appearance on the public stage in New York. He argues that even if he once was a public figure for a limited purpose the passage of time has restored him to the status of a private citizen. The District Court held however that "historical comment on the espionage-related activities of Wolston and others who became involved in the controversy during the 1950's requires just as much protection as did media coverage of the events as they occurred". 429 F. Supp. at 178. Again we agree with the District Court. The issue of Soviet espionage in 1958 and of Wolston's involvement in that operation continues to be a legitimate topic of debate today, for that matter concerns the security of the United States. The mere lapse of time is not decisive. *Meeropol* v. *Nizer*, 381 F. Supp. 29 (S.D.N.Y. 1974), *aff'd*, 560 F.2d 1061 (1977), *cert. denied*, 98 S.Ct. 727 (1978). In the *Meeropol* case the plaintiffs were the children of Julius and Ethel Rosenberg who were executed in 1953 following a trial for espionage. The District Court (Tyler, J.) held that in 1974 they remained public figures because as children of the Rosenbergs they had "spent much of their early years in the public spotlight." *Id.* at 34. The Circuit Court of Appeals agreed "that the Rosenberg sons are public figures. . . . In the course of extensive public debate revolving about the Rosenberg trial appellants were cast into the limelight and became 'public figures' under the *Gertz* standards." 560 F.2d at 1066.

THE ABSENCE OF ACTUAL MALICE

Under the rule of *New York Times Co.* v. *Sullivan*, *supra*, the plaintiff may not recover for a defamatory falsehood unless he can show that it was published with "actual malice", that is with knowledge that it was false

or with reckless disregard of whether it was false or not. This means that the defendants here were entitled to summary judgment unless Wolston, as a public figure, could show enough to go to a jury on the issue of actual malice. *Washington Post Co.* v. *Keogh*, 125 U.S. App. D.C. 32, 35, 365 F.2d 965, 968 (1966), *cert. denied*, 385 U.S. 1011 (1967); *cf. Goldwater* v. *Ginzburg*, 261 F. Supp. 784, 788 (S.D.N.Y. 1966). We therefore turn to the evidence before the District Court on this issue.

The defendant Barron devoted four years to the writing of *KGB*. He was assisted by the large Reader's Digest research staff with offices both in this country and abroad. It appears however that the statements about Wolston in *KGB* were based primarily upon the FBI report published in 1960, and to a lesser extent upon the book, "My Ten Years As a Counterspy", published in 1959.

The author of the book "My Ten Years As a Counterspy," Boris Morros, was a former Soviet espionage agent and confederate of Jack Soble who later became a double agent for the F.B.I. In the book, Morros identifies Wolston as a Soviet espionage agent in the United States. According to Morros, Soble told him that an individual who had operated in Germany under the code name "Slava" had supplied Soble with information valuable to the Soviets. Morros states that in the fall of 1954 Soble identified Ilya Wolston as "Slava". "Slava" or Wolston is mentioned on eighteen pages in the book, but Morros adds that he knew nothing about Wolston's activities except what Soble, "a confirmed liar," told him. The book also recites that Wolston failed to respond to six subpoenas issued by a federal grand jury, that Wolston pled guilty to a contempt of court charge, and that he received a one-year suspended sentence. Approximately 12,500 copies of the hardcover edition of the Morros book were printed, and 141,000 copies of the paperback edition.

In May 1960 the Federal Bureau of Investigation prepared a report entitled "Expose of Soviet Espionage". By direction of the Attorney General the report was transmitted to the Subcommittee to Investigate the Administration of the Internal Security Act and other In-

ternal Security Laws of the Committee on the Judiciary of the United States Senate and in July it was published by the Subcommittee. 13,000 copies of the Report were ordered to be printed. A section of the report entitled "Jack Soble Case" contains the following.

> In the early 1940's the FBI was conducting an intensive investigation into the activities of Vassili Zubilin (true name, Vassili Mikhailovich Zarubin), Third Secretary of the Soviet Embassy, Washington, D.C. Zubilin had entered the United States on December 25, 1941, with his wife, Elizabeth, and son, Peter. The investigation disclosed that Zubilin had been an important Soviet intelligence agent for many years. During 1934-1937 he was in the United States on several occasions utilizing an American passport fraudulently obtained under the name of Edward Joseph Herbert.
>
> The first break in the FBI investigation came when in the Spring of 1943, Zubilin, while under physical surveillance by the FBI, was observed to contact Boris Michael Morros, a motion-picture producer in Hollywood. After extensive investigation into the activities of Morros, he was interviewed by the FBI in July, 1947, and admitted he was recruited by Zubilin for Soviet intelligence activities. Morros, thereafter, agreed to operate as a double agent against the Soviets under the direction of the FBI. Thus began an operation of intrigue which led to the expose of a Soviet espionage ring in New York City culminated by the arrest on January 25, 1957, by FBI Agents of Jack Soble, Myra Soble and Jacob Albam on charges of conspiring to commit espionage. In addition, *the FBI investigation resulted in identifying as Soviet intelligence agents*, Jane and George Zlatovski, who were indicted on July 8, 1957, charged with espionage conspiracy; Alfred and Martha Stern, who were indicted on September 9, 1957 on two counts charging espionage conspiracy; *Ilya Wolston*, who was charged with contempt for failing to appear before a grand jury and on August 7, 1958, pleaded guilty in the Southern

District of New York; Mark Zborowski, who was indicted for perjury on April 18, 1958, as a result of his denial before the Federal Grand Jury that he knew Jack Soble; and Vassili Molev, an official attached to the Soviet Embassy, Washington, D.C., who was declared persona non grata, January 25, 1957. [Emphasis supplied]

Jack and Myra Soble

* * * *

Soble supervised activities of Soviet agents both in the United States and Europe; assigned them to recruit U.S. Government employees stationed abroad, to obtain information concerning military equipment and supplies; and has claimed to have obtained information concerning the number of atomic bombs stockpiled in the United States and the rate of atomic bomb production as well as photographs of atomic "bunkers" in which bombs were stored.

(App. 324).

In a section entitled "Ilya Wolston" the report states:

On several occasions beginning May 7, 1950, Jack Soble furnished Boris Morros with information concerning an individual he described as a U. S. Army Colonel in Germany who furnished him information under the code name "Slava," which was very valuable to the Soviets. It is noted that from October, 1949, until July, 1951, Wolston was employed by the U. S. High Commissioner of Germany in Berlin. In January, 1955, Soble identified his nephew, Ilya Wolston as "Slava." In addition, Jack Soble, pleading guilty in April, 1957, furnished information identifying Wolston as a Soviet agent who provided him information for the Soviets on several occasions beginning when Wolston was in a military camp, about 1943. Soble said Wolston gave him information concerning his assignments and names of four persons at the camp whom he believed could be approached by the Soviets.

Information concerning the probable identification of Wolston as a Soviet agent was furnished to the Department of State in 1951, together with data developed concerning his black market activities in Germany. The Department of State, on the basis of these data, dismissed Wolston from his employment in Berlin. [Emphasis supplied]

(App. 325, 326).

Barron testified on deposition that he "had read the Boris Morros book, which identifies Mr. Wolston as a Soviet agent in numerous pages. But for purposes of documentation, it was the Senate Report on which we relied." (App. 64) In an affidavit he swore "I was confident upon publication of *KGB* that the book as a whole and each and every statement in it were true, and I was aware of no fact that tended to make me doubt the truth of the book or of any statement in it. . . . At no time have I been aware of any fact that would give me reason to doubt the truth of the F.B.I. Report or of any statement in it." (App. 294-95) To meet this evidence of good faith and get to a jury Wolston was required to produce evidence that notwithstanding his asserted reliance upon the book and report Barron "in fact entertained serious doubts as to the truth of his publication" and recklessly disregarded whether it was true or false. *St. Amant* v. *Thompson*, 390 U.S. 727, 731 (1968). As the Court put it in *Garrison* v. *Louisiana*, 379 U.S. 64, 74 (1964) it was necessary to show that the publication was made with a "high degree of awareness of . . . probable falsity."

To carry his burden Wolston contends that the facts justify the inference that Barron entertained serious doubts as to the truth of his statement that Wolston was a Soviet agent. First, Wolston says Barron knew that in his book Morros had characterized Soble as a "confirmed liar", and that Soble, an admitted spy, was therefore an unreliable source. Second, Wolston cites Barron's admitted failure to "check with the FBI or to make any other inquiry before labeling Wolston a Soviet agent, notwithstanding the fact that the capacity to make such inquiry was readily at hand." (Wolston Br. 31-32) We are not persuaded by these arguments.

It is apparent from the F.B.I. report that Soble's statements are not the only basis for the Bureau's conclusion

that Wolston was a Soviet agent. Thus the report states that "[i]nformation concerning the probable identification of Wolston as a Soviet agent was furnished to the Department of State in 1951, together with data developed concerning his black market activities in Germany." (App. 325-26) The report states however that it was not until January 1955 that Soble identified his nephew as Slava; and Morros in his book (P. 196) says this disclosure was first made to him by Soble in the fall of 1954. Moreover, the plain intendment of the F.B.I. report, taken as a whole, is that the Bureau's investigation identified Wolston as a Soviet agent, without reference to Soble. As for the Morros characterization of Soble as a "confirmed liar" it must be remembered that Morros was speaking of Soble, the Soviet agent. Barron in his deposition explained:

> I think we are speaking about, in a sense, two different people here—the Jack Soble as a Soviet agent and still under Soviet discipline, who was a professional agent, dissembling by nature and not necessarily immorally in his scheme of ethics as an agent, and then the Jack Soble who for reasons of his own decided to tell what he knew to the United States Government.

(App. 86).

The F.B.I. report makes it plain that when Soble "decided [to] tell what he knew" to the government the F.B.I. considered him a credible witness; and it was reasonable for Barron to accept this expert evaluation of Soble's credibility. We think the characterization of Soble by Morros is too weak a reed to support an inference that Barron's reliance upon the report was reckless.

We reject the argument that Barron was reckless because he failed to make inquiry to verify the statements in the F.B.I. report. Failure to investigate does not itself establish bad faith or recklessness. *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 287-88 (1964); *St. Amant* v. *Thompson*, 390 U.S. 727, 733 (1968). In any event Barron was entitled to rely upon the report of the F.B.I., one of the great investigative agencies of the world, and

to believe that the Bureau's investigative skill and resources far exceeded any that were available to him. Moreover, so far as the Soble case was concerned, the report bore upon its face intrinsic proof of its reliability. The report stated that the Bureau's investigation of the case identified ten individuals as Soviet intelligence agents. Eight of these persons were indicted for espionage or perjury and pled guilty, were convicted, or became fugitives. The ninth, an attache to the Soviet delegation to the United Nations, was declared *persona non grata* and left the country. The tenth was Wolston. Thus, the results demonstrated the validity of the Bureau's investigative conclusions. Furthermore, the extensive research conducted by Barron and his staff, over a period of four years, revealed no evidence that Wolston had ever objected to the statements about him in the Bureau's report, or in the Morros book.

Finally Wolston contends that he was libeled by the footnote Barron appended to his list of "Soviet agents identified in the United States". As we have seen, the list includes Wolston. We repeat the footnote:

> No claim is made that this list is complete. It consists of Soviet agents who were convicted of espionage or falsifying information or perjury and/or contempt charges following espionage indictments or who fled to the Soviet bloc to avoid prosecution.

Wolston says this note falsely states that he was convicted of espionage and supports "the proposition that Barron was operating with reckless disregard for truth or falsity." Barron testified on deposition that to him the note meant that Wolston "fell in the category of someone who was convicted of contempt of court following espionage indictments [of others], which raised matters about which he refused to testify". (App. 70) We must agree with Wolston that the second sentence of the note is imprecise and ambiguous, and might be read as an awkward and involuted statement that he was indicted; but we think it does not follow as a reasonable inference that in writing it Barron was reckless or acted in bad faith. Imprecision and ambiguity of expression

are ills that sometimes afflict even careful and well-intentioned writers, including lawyers and judges. We think of E. B. White, commenting on a fuzzy passage in one of his essays: "the thing didn't come out as clear as I would have liked, but nothing I write ever does." E. B. WHITE, ESSAYS 87 (Harper & Row, New York, 1977).

CONCLUSION

We hold that Barron was entitled to summary judgment upon the ground that Wolston was a public figure and that the evidence raised on genuine issue with respect to the existence of actual malice on his part. This conclusion applies only to the defendants Reader's Digest, Bantam Books, Inc., Book-of-the-Month Club and MacMillan Book Clubs, Inc. The judgments of the District Court are

Affirmed.[3]

---

[3] As an alternative ground for its decision the District Court in a footnote suggested that even if Wolston was not a public figure the "actual malice" standard of *New York Times Co.* v. *Sullivan* would still apply as a matter of District of Columbia law. The court cited *Hatter* v. *The Evening Star Newspaper Co.*, Civ. No. 8278-75 (March 15, 1976) in the Superior Court of the District of Columbia. In that case a judge of the Superior Court, granting summary judgment for the defendant in a libel case, stated, without elaboration or citation of authority:

> This Court concludes that the appropriate rule in this jurisdiction should be, and is, that a private individual involved in a matter of public concern may not recover in libel against a publisher, reporter or broadcaster who reports or comments on that matter, unless he proves by clear and convincing evidence that the defendants have violated the "actual malice" standard set forth in New York Times Company v. Sullivan, 376 U.S. 254 (1964).

The court's statement apeared in a brief unpublished order which recited several other grounds for granting summary judgment. Although we need not and do not decide whether this pronouncement is a definitive statement of District of Columbia law, we note that in a subsequent case, *Phillips* v. *Evening Star Newspaper Co.*, Civ. No. 9999-75 (June 30, 1977), 105 Daily Washington Law Reporter 1425, another judge of the Superior Court filed an elaborate opinion which concluded to the contrary that in the District a newspaper may be liable for actual damages suffered by a private person if it negligently publishes defamation, without actual malice.

SUPREME COURT OF THE UNITED STATES

No. 78-5414

ILYA WOLSTON, PETITIONER

v.

READER'S DIGEST ASSOCIATION, ET AL.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is set for oral argument in tandem with No. 78-680, *Hutchison* v. *Proxmire*.

January 8, 1979

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-5414

ILYA WOLSTON, *Petitioner*

v.

THE READER'S DIGEST ASSOCIATION, INC., d/b/a READER'S DIGEST PRESS; BANTAM BOOKS, INC.; BOOK-OF-THE-MONTH CLUB, INC., MACMILLAN BOOK CLUBS, INC.; JOHN BARRON, *Respondents*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-5414

ILYA WOLSTON, *Petitioner*

v.

THE READER'S DIGEST ASSOCIATION, INC., d/b/a READER'S DIGEST PRESS; BANTAM BOOKS, INC., BOOK-OF-THE-MONTH CLUB, INC., MACMILLAN BOOK CLUBS, INC.; JOHN BARRON, *Respondents*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

The respondents, The Reader's Digest Association, Inc., John Barron, Bantam Books, Inc., The Book-of-the-Month Club, Inc., and MacMillan Book Clubs, Inc., respectfully request that this Court deny the petition for a writ of certiorari seeking review of the opinion of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-16) is reported at 578 F.2d 427. The opinion of the district court (Pet. App. 17-30) is reported at 429 F. Supp. 167.

JURISDICTION

The judgment of the court of appeals was entered on May 23, 1978. The petition for a writ of certiorari was filed on September 18, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was correctly held to be a public figure under *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974) and *Time, Inc.* v. *Firestone*, 424 U.S. 448 (1976) for the limited purpose of the issues involved in this case.

2. Whether judgment was properly granted in respondents' favor on the issue of whether the allegedly libelous statement was published with "actual malice," that is, "with knowledge that it was false or with reckless disregard of whether it was false or not," as required by *New York Times, Inc.* v. *Sullivan*, 376 U.S. 254, 271-72 (1964) and its progeny.

STATEMENT

This case involves a libel action brought by petitioner Ilya Wolston against the respondent author, John Barron, and the respondent publishers of a book entitled *"KGB: The Secret Work of Soviet Secret Agents"* (hereinafter *KGB*).[1] The pertinent factual background of this case is fully and accurately set forth in the opinion of the court of appeals. Briefly, it is as follows:

During 1957 and 1958, a special federal grand jury convened in the Southern District of New York was conducting an investigation into the activities of Soviet intelligence agents

[1] Respondent The Reader's Digest Association, Inc. is the initial publisher of *KGB*. Respondents Bantam Books, Inc., The Book-of-the-Month Club, Inc., and MacMillan Book Clubs, Inc. are the subsequent publishers under contractual arrangements with The Reader's Digest.

in the United States. On January 25, 1957, the Federal Bureau of Investigation arrested petitioner Wolston's aunt and uncle, Jack and Myra Soble, on espionage charges. The special federal grand jury later indicted the Sobles on five counts charging espionage, conspiracy, and violation of the Registration Acts. In April 1957, Jack Soble pleaded guilty to espionage charges and was sentenced to seven-years imprisonment. (Pet. App. A-5).

On the day of the Sobles' arrest, the FBI interviewed petitioner at his home. Shortly thereafter, the special federal grand jury subpoenaed petitioner to appear in connection with its continuing investigation of Soviet espionage. (Pet. App. A-5). On July 1, 1958, petitioner failed to respond to a subpoena requiring his appearance before the special federal grand jury on that date. The United States District Court for the Southern District of New York thereupon issued a show cause order to petitioner, and on August 7, 1958, following a hearing on the matter, petitioner pleaded guilty to the charge of criminal contempt. Petitioner received a one-year suspended sentence and was placed on probation for three years on the condition that he be available for any further grand jury inquiries regarding Soviet espionage. (Pet. App. A-5, A-6).

As set forth in the record and recounted in the opinions of the district court and court of appeals, petitioner's criminal evasion of the grand jury subpoena and involvement in the contempt proceedings attracted a significant amount of public attention and were the subject of at least fifteen newspaper articles. News articles were published in New York, where the grand jury was sitting, and in Washington, D.C., where petitioner lived. The articles focused on petitioner Wolston's failure to appear and on the United States District Court's show cause order. (Pet. App. A-6, A-7). The articles reported statements by Assistant United States Attorney Herbert C. Kantor that petitioner was the nephew of the Sobles and had been in contact with them for a long time before their arrest in January 1957. Three of the articles reported a statement by Mr.

Kantor that petitioner was believed to have material information about the espionage matters under investigation, which were described as concerning a "general criminal conspiracy against the U.S." (Pet. App. A-6).

Newspapers further reported that the federal judge presiding at the contempt hearing commented that "there is no question in my mind that there was a studied attempt [by Wolston] to avoid [an] appearance before this grand jury." (Pet. App. A-6). Other news articles stated that, according to Assistant United States Attorney Kantor, petitioner had also failed to appear in response to five prior subpoenaes issued by the special federal grand jury. News articles were later published about petitioner's plea to criminal contempt and about petitioner's sentence and probation. (Pet. App. A-6). In sum, as the record reflects, petitioner's activities and criminal conduct in relation to the special federal grand jury's investigation were the subject of extended public comment and attention.

These matters concerning petitioner continued to be the subject of public discussion. In 1959, a book written by Boris Morros entitled *My Ten Years As A Counterspy* was published by Viking Press, Inc. Morros was a confessed Soviet espionage agent who later served as an intelligence agent for the Federal Bureau of Investigation. He was also a former confederate of Jack Soble, petitioner's uncle. In his book, Morros identified petitioner as a Soviet espionage agent in the United States. According to Morros, Soble claimed that an individual who had operated in Germany under the code name "Slava" had supplied him with information valuable to the Soviets. Morros stated that Soble subsequently identified Ilya Wolston as "Slava." Morros added, however, that he knew nothing about Wolston's activities except what Soble, "a confirmed liar," had told him. (Pet. App. A-9). The book also recited that Wolston failed to respond to six subpoenas issued by a federal grand jury, that Wolston pleaded guilty to a contempt-of-court charge, and that he received a one-year suspended sentence.

In 1960, the Federal Bureau of Investigation completed a report entitled "Expose of Soviet Espionage, May 1960." (Pet. App. A-10). By direction of the Attorney General, the FBI report was transmitted to the Internal Security Subcommittee of the Senate Judiciary Committee and was published by that Subcommittee in July of 1960. On page 24, the report stated that an FBI investigation resulted in identifying Ilya Wolston as a Soviet intelligence agent:

> "In addition, the FBI investigation resulted in identifying as Soviet intelligence agents ... Ilya Wolston, who was charged with contempt for failing to appear before a grand jury and on August 7, 1958, pleaded guilty in the Southern District of New York ...." (Pet. App. A-10).

In another section entitled "Ilya Wolston," the FBI report reiterated the information Soble had provided to Morros to the effect that petitioner was the Soviet agent known as "Slava" and further stated that Soble, when pleading guilty to espionage in April 1957, furnished information identifying Wolston as a Soviet agent. In addition, the FBI report stated that the Department of State had also previously received information concerning petitioner Wolston's probable identification as a Soviet agent:

> "Information concerning the probable identification of Wolston as a Soviet agent was furnished to the Department of State in 1951, together with data developed concerning his black market activities in Germany. The Department of State, on the basis of these data, dismissed Wolston from his employment in Berlin." (Pet. App. A-12).

As set forth above, the report indicated that the FBI did not rely exclusively or even primarily on Soble in identifying Wolston as a Soviet agent. On the earlier cited page, the report categorically stated that an FBI investigation resulted in the identification of petitioner as a Soviet agent, and another

section of the report stated that information concerning the probable identification of Wolston as a Soviet agent was furnished to the Department of State in 1951, six years before Soble's arrest for espionage.

In January 1974, Reader's Digest Press published *KGB*, which details the functions and activities of the Soviet Union's intelligence and espionage organization. The author of *KGB*, John Barron, devoted more than four years to researching and writing the book, drawing on the world-wide research facilities of Reader's Digest organization. Another Reader's Digest professional assisted the author in researching *KGB* on a full-time basis during the four-year period in which the book was prepared. On page 188 of the book, referring to disclosures by "royal commissions in Canada and Australia and official investigations in Great Britain and the United States," the following sentence and footnote appear concerning petitioner:

> "*Among Soviet agents identified in the United States were* Elizabeth T. Bentley, Edward Joseph Fitzgerald, William Ludwig Ullmann, William Walter Remington, Franklin Victor Reno, Judith Coplon, Harry Gold, David Greenglass, Julius and Ethel Rosenberg, Morton Sobell, William Perl, Alfred Dean Slack, Jack Soble, *Ilya Wolston,* Alfred and Martha Stern.*

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* No claim is made that this list is complete. It consists of Soviet agents who were convicted of espionage or falsifying information or perjury and/or contempt charges following espionage indictments, or who fled to the Soviet bloc to avoid prosecution . . . ." (Pet. App. A-3). (Emphasis added).

In addition, the following entry concerning Wolston appears in the index to KGB:

> "Wolston, Ilya, Soviet agent in U.S., 188". (Pet. App. A-3).

In the more than 460 pages of *KGB*, the sentences quoted above consitute the only references to Wolston.

In March 1975, petitioner filed the present libel action against respondents. Petitioner claimed that *KGB* contained false and libelous statements to the effect that he had been identified as a Soviet agent and that he had been indicted for espionage. On deposition and in an affidavit, respondent Barron testified that, in referring to Wolston in *KGB* as having been identified as a Soviet agent, he relied on the May 1960 FBI report, which unequivocally identified Wolston as a Soviet intelligence agent. (Pet. App. A-12). The FBI report is cited in the "Chapter Notes" of *KGB* as a source document for the information about Soviet agents in the United States appearing in Chapter IX of the book. This is the chapter containing the references to Wolston.

The affidavits and depositions submitted in the district court further established that at no time was Barron ever aware of any fact giving him reason to doubt the truth of the FBI report or any statement in that report. (Pet. App. A-12). There was no evidence that the accuracy of the FBI report had been called into question at the time *KGB* was published; nor was there any evidence that the respondents had, or should have had, any reason to doubt the accuracy of the FBI's identification of Wolston as a Soviet agent. The record also showed that upon publication of *KGB*, Barron believed that the book as a whole and each and every statement in it were true and that he was not aware of any fact that tended to make him doubt the truth of the book and the statements therein. Relying on the reputation of the Reader's Digest as a well-known and respectable publishing house, the subsequent publishers also believed that *KGB* was accurate in all respects and were not aware of any fact that tended to make them doubt the truth of the book; they were not aware of any claims of inaccuracy concerning the book. (CA App. 341-347).

On the basis of the above record, the district court granted respondents' motion for summary judgment. 429 F.Supp. 167

(D.D.C. 1977). 1977). The court of appeals affirmed. 578 F.2d 427 (D.C. Cir. 1978). The court of appeals held that under the standard of *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974) and *Time, Inc.* v. *Firestone*, 424 U.S. 448 (1976), petitioner was a public figure for the limited purpose of comment on his connection with, or involvement in, espionage in the 1940's and 1950's, which was the subject of the alleged falsehood. (Pet. App. A-7). The court of appeals therefore noted that, in order to recover, petitioner was required to demonstrate that the alleged falsehood was published with "actual malice," that is, with knowledge that it was false or with reckless disregard of whether it was false or not. (Pet. App. A-7). Finding that the district court had correctly held that the evidence raised no genuine issue with regard to the existence of actual malice on respondents' part, and that petitioner could not make the necessary showing in that regard, the court of appeals concluded that summary judgment for respondents was required. (Pet. App. A-8—A-16).

ARGUMENT

As the opinions of both lower courts plainly demonstrate, this case involves the straightforward application of the settled principles of *Gertz* v. *Robert Welch, Inc., supra,* and *Time, Inc.* v. *Firestone, supra,* to the discrete and unique facts presented in the instant record. The court of appeals did not purport to announce any new legal principle, and the issues which petitioner seeks to raise are essentially factual in nature. Accordingly, respondents submit that this case does not possess the continuing importance required to warrant this Court's review. Therefore, the petition should be denied.

A. The Decision Below That Petitioner Is A Public Figure Is In Accord With This Court's Prior Decisions And Raises No Substantial Question

1. With respect to the first question raised in his application (Pet. 10-14), petitioner's contention that, under the

facts of this case, he should not be deemed to be a public figure for constitutional libel purposes was thoroughly considered by the district court and court of appeals and, in our view, was correctly rejected by both courts. The decision below is fully in accord with this Court's prior decisions.

In *Gertz* v. *Robert Welch, Inc.*, 418 U.S. at 345, the Court noted that an individual may become a public figure in either of two alternative ways:

> "In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a public controversy and thereby becomes a public figure for a limited range of issues." *Id.*, at 351.

In the instant case, petitioner's own voluntary actions placed him squarely within the second category of public figures described in *Gertz*—"a public figure for a limited range of issues."

Petitioner was a primary actor in the public controversy relating to the FBI investigation of a Soviet espionage ring and the activities of the special federal grand jury convened in the Southern District of New York to inquire into that matter. Through his criminal refusal to obey a duly authorized subpoena, which required his appearance before the special federal grand jury, petitioner voluntarily thrust himself into the public controversy relating to the government's espionage investigation. Because of the obvious prominence in the public's mind of the subject of espionage, and because petitioner's uncle, Jack Soble, had previously pleaded guilty to espionage charges, petitioner's determination not to appear before the grand jury legitimately aroused considerable public attention. His own willful conduct thereby exposed petitioner to increased public

scrutiny for the range of issues relating to espionage and the activities of the grand jury. As the court of appeals concluded:

> "By failing to appear before the grand jury Wolston invited public attention and comment. Until that failure occurred he enjoyed obscurity in the wings, but by subjecting himself to a citation for contempt he voluntarily stepped center front into the spotlight focused on the investigation of Soviet espionage. In short, by his voluntary action he invited attention and comment in connection with the public questions involved in the investigation of espionage. The reference to him in *KGB* related strictly to those issues, without intruding into his personal life or affairs. *Cf. Time, Inc.* v. *Johnston,* 448 F.2d 378, 381 (4th Cir. 1971). Any contention that his appearance on the stage was involuntary is conclusively answered by his conviction for contempt." (Pet. App. A-7, A-8).

We submit that petitioner was therefore properly held to be a public figure for the limited purposes of the issues in this case.

2. Petitioner's argument that his actions were analogous to Mrs. Firestone's involvement in divorce litigation in *Time, Inc.* v. *Firestone, supra,* ignores the present record. In concluding that Mrs. Firestone was not a public figure, this Court reasoned that Mrs. Firestone had not voluntarily injected herself into a public controversy merely by instituting a divorce litigation because "[s]he was compelled to go to court by the State in order to obtain legal release from the bonds of matrimony." 424 U.S. at 454. The Court further explained that a divorce proceeding is "not the sort of 'public controversy' referred to in *Gertz,*" even though this particular divorce may have been a "cause celebre" in Palm Beach society. *Ibid.*

By contrast, petitioner's actions did not consist solely of invoking the legal process in a wholly lawful and customary manner. Unlike Mrs. Firestone, petitioner voluntarily chose to

violate the requirements of the legal process by refusing to respond to grand jury subpoenae and was accordingly adjudicated to have committed criminal contempt. Compliance with the subpoena, like Mrs. Firestone's compliance with the requirements of the divorce and maintenance laws, may have enabled petitioner to preserve his anonymity and to continue to maintain the full measure of protection to his privacy and reputation. Petitioner, however, elected not to comply with the subpoena and instead committed a criminal violation. Unlike Mrs. Firestone, petitioner was not compelled by the government to embark on a course that inevitably invited attention and comment. He freely chose to do so himself and consequently relinquished his status as a fully private individual.

Additionally, there can be no doubt that, unlike *Firestone,* the present case involves a "public controversy" as referred to in *Gertz.* The activities of Soviet espionage agents in the United States go directly to the security of the Nation itself, the debate concerning which must be "uninhibited, robust, and wide-open." *New York Times Inc.* v. *Sullivan,* 376 U.S. at 270. This matter cannot be compared to the divorce litigation involved in *Firestone,* a domestic and customarily private matter.

3. Contrary to petitioner's assertion (Pet. 11), it is also obvious that the court of appeals' decision is not based on the theory that involvement in a criminal proceeding renders a person a public figure. Nor did the court of appeals adopt any *per se* rule that commission of criminal conduct deprives an individual of his status as a private person. Rather, in concluding that petitioner was a public figure, the court of appeals relied upon the entire factual context surrounding petitioner's criminal conduct and the public controversy in which petitioner involved himself.

Petitioner explicitly recognizes that criminal conduct may make a person a public figure, but argues that his own

subjective intent was "to crawl into a hole" (Pet. 11). The question of petitioner's subjective intent is not only a legal irrelevancy, but a factual issue not worthy of this Court's consideration. In any event, as the court of appeals recognized (Pet. App. A-5, A-8), the willfulness of petitioner's conduct is conclusively answered by his conviction for contempt. This is plainly not the forum for relitigation of petitioner's criminal conviction.[2]

Finally, petitioner's argument that the standards regarding "public figures" are confusing and need further clarification is unsupported. He is unable to cite any cases demonstrating conflicting applications of *Gertz* and *Firestone* or any necessity for reexamination of the established principles. Moreover, the unique nature of the present factual setting, and the manifest correctness (in our view) of the decision below, make this case an inappropriate vehicle for any further articulation of the principles of *Gertz* and *Firestone*.

B. There Is No Conflict Among The Circuits Regarding The Summary Judgment Standard For Actual Malice and No Showing That Summary Judgment was Improperly Granted in This Case

1. With respect to the second question raised in his application (Pet. 14-19), petitioner asserts that there is a conflict between the District of Columbia Circuit and the Ninth Circuit regarding the principles governing summary judgment

[2] We note that much of petitioner's memorandum is devoted to constructing a self-serving factual rendition of the circumstances resulting in his contempt conviction. Petitioner's efforts to impeach his own guilty plea demonstrate the factual nature of the issues he seeks to raise as well as the inappropriateness of this case for review. Furthermore, petitioner's assertion that his own subjective intent determines whether he is a public figure runs contrary to this Court's decision in *Gertz* that public figures are individuals whose actions "invite attention and comment" and that "the communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them." 418 U.S. at 345.

on the issue of "actual malice" as defined in *New York Times, Inc.* v. *Sullivan, supra.* In essence, it is contended that a concurring opinion to the District of Columbia Circuit's decision in *Wasserman* v. *Time, Inc.*, 424 F.2d 920, *cert. denied*, 398 U.S. 940 (1970), articulated a summary judgment standard different from that applied by the Ninth Circuit in *Guam Federation of Teachers, Local 1581, AFT* v. *Ysreal*, 492 F.2d 438, *cert. denied*, 419 U.S. 872 (1974).

To begin with, there is plainly no conflict between the District of Columbia Circuit and the Ninth Circuit regarding the applicable summary judgment standards. Although not revealed in petitioner's memorandum, the opinion in *Wasserman* upon which petitioner relies in his argument, and which the Ninth Circuit discusses in *Ysreal*, is a concurring opinion, and the views expressed by its author were purely *obiter dicta*. The Ninth Circuit explicity recognized this fact in *Ysreal*, noting that "[w]hat [the concurring judge] said was not necessary to the decision, because in *Wasserman* the court reversed a summary judgment for the defendant and remanded 'for trial on the issues of actual malice, defamation and possible damages.'" 492 F.2d at 440. The Ninth Circuit further observed (*id.*, at 443) that its own views were in fact consistent with the summary judgment standard actually followed by the District of Columbia Circuit, citing *Washington Post Co. Keogh*, 365 F.2d 965 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1011 (1967).

Furthermore, the court of appeals in the instant case did not cite or purport to rely upon the views expressed by the concurring opinion in *Wasserman*. As its opinion reflects, the court of appeals applied traditional summary judgment principles, and viewing all the evidence in the light most favorable to petitioner, still concluded that there was no genuine issue regarding the question whether the allegedly defamatory statements were published with "actual malice."

Petitioner makes no showing that summary judgment was improperly granted or that there is a genuine issue in this case

regarding "actual malice." The court of appeals considered all of petitioner's contentions and found no evidence in the record that respondent Barron or the other respondents "in fact entertained serious doubts as to the truth of his publication" or recklessly disregarded whether it was true or false. *St. Amant* v. *Thompson,* 390 U.S. 727, 731 (1968). The court of appeals' opinion thoroughly examines the evidence in this regard, and we rely upon that discussion.[3]

Again, the issues which petitioner seeks to raise turn on the particular facts of this case and do not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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[3] Petitioner's passing and unexplained suggestion that this case is a "variant" of the problem presented in *Herbert* v. *Lando,* No. 77-1105, *cert. granted,* March 20, 1978, is difficult to comprehend. The questions in *Herbert,* relating to the scope of discovery, bear no relation to the questions raised by petitioner. Here, petitioner was accorded full discovery rights and still presented no evidence of "actual malice."

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October Term, 1978

No. 78-5414

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REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

I.

Respondents' brief in opposition further focuses the "public figure" issue in this case. Respondents argue that by failing to appear in response to a grand jury subpoena "petitioner voluntarily thrust himself into the public controversy relating to the government's grand jury investigation" (Brief in Opp., p. 7), and thereby became a "public figure" within the meaning of Gertz and Firestone.[1/] But

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1/ Gertz v. Robert Welch, Inc., 418 U.S. 323; Time, Inc. v. Firestone, 424 U.S. 448.

that argument fails to give recognition to the fact that the process started with governmental coercion through compulsory process, akin to Mrs. Firestone's compulsion to resort to the courts if she would obtain a divorce, and further depends on the proposition that failure to appear in response to a subpoena is, as a matter of law and without regard to the circumstances, voluntary action by which a person purposefully injects himself into a public controversy. While it is possible to conceive of circumstances which would support a determination of voluntariness, such as where an individual desired to make himself the object of an attack on state power, there are other circumstances which are inconsistent with such conclusion. We submit that the circumstances here present a compelling instance of nonvoluntariness. Indeed, this much is tacitly acknowledged by respondents' felt need to characterize petitioner's evidence on this point as "self-serving" (Brief in Opp. p. 12, n.2). In any event, the evidence submitted in opposition to defendants' motion for summary judgment should have precluded the granting of that motion.

II.

The second question raised by the Petition is whether, assuming that this action is governed by the New York Times "malice" standard, it is appropriate to grant summary judgment on that issue by crediting the affidavit or deposition of the author of the publication with respect to his states of mind and drawing inferences favorable to the defendants from the evidence. We asserted that the Court of Appeals' decision affirming summary judgment on that issue is contrary to the decisions of this Court and is in conflict with a decision of

the Ninth Circuit. Respondents address only the inter-circuit conflict. That able and resourceful counsel have been unable to advance even a plausible argument to reconcile the decision below with the precedents of this Court in Poller, [2/] Diebold, [3/] and Agosto, [4/] cited at Pet. 15-16, is reason enough, we submit, why the decision below cannot stand. Indeed, respondents' statement of the case reinforces our showing of the petition that it was essential to the decision below that Barron's testimony be credited. (See the references thereto at Brief in Opp., p. 7.) The reference, id., to what "the record also showed" is likewise a reference to Barron's testimony. And respondents' reliance on the Court of Appeals' discussion of the evidence (Brief in Opp., p. 14) does not explain how, given the well-established limitations on summary judgment, it could have been proper for the Court of Appeals to accept as true Barron's affidavit and deposition regarding his own state of mind, and to draw inferences from the record which are favorable to the party moving for summary judgment. Contrast the cases cited at Pet. 15-16.

Given the conflict between the decision below and those of this Court, the presence of a conflict between the circuits should be unnecessary to merit review. In any event, the presence of a conflict between the decision below in this

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2/ Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464.

3/ United States v. Diebold, Inc., 369 U.S. 654.

4/ Agosto v. Immigration & Naturalization Service, 98 S.Ct. 2081.

case and that of the Ninth Circuit in Ysrael, [5] is uncontroverted and uncontrovertible. It is plain that the court below in this case did precisely that against which the Ninth Circuit admonished in Ysrael, for the court below did "weigh the credibility of the evidence" and did "draw inferences in favor of the moving party" which is what the Ninth Circuit correctly held "neither the judge nor this Court on appeal has the authority" to do. 492 F.2d at 441 quoted at Pet. 18. [6]

Respondents profess to be unable "to comprehend" our analogy of the present case to Herbert v. Lando, #77-1105, argued October 31, 1978. (Brief in Opp. 14, n.3). The similarity is this: In both cases the defendants have asserted,

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5/ Guam Federation of Teachers, Local 1581, A.F.T. v. Ysrael, 492 F.2d 438 (9 Cir.), cert. denied, 419 U.S. 872 (1974).

6/ Respondents attempt to confine our position to be only that there is a conflict between the Ninth Circuit's decision in Ysrael and that of the D.C. Circuit in Wasserman v. Time, Inc., 424 F.2d 920 (1970), cert. denied, 398 U.S. 940 (1970). (Brief in Opp., p. 13, particularly the sentence beginning, "In essence * * *", which sweeps away everything else.) Wasserman was quoted in the Petition because it was the most elaborate statement of the special summary judgment rule which the District of Columbia Circuit has declared for cases which it considers to be governed by the New York Times standard; it reaffirmed the rule Judge Wright had expressed for this Court in Washington Post Co. v. Keogh, 365 F.2d 965 (D.C. Cir. 1966), cert. denied, 385 U.S. 1011 (1967), the precedent cited by the Court of Appeals in this case.

While Judge Wright's opinion in Wasserman was a concurring opinion, what is relevant is that it represented the views of the majority of the panel, since Judge Robinson joined therein. And even if that opinion was not necessary to the decision, it was an instruction to the lower courts in that Circuit. The District Courts have so understood Keogh and Wasserman as placing on plaintiff a special burden to defeat a motion for judgment on the New York Times malice issue. See, in addition to the District Court Opinion herein (Pet. A-29), Buckley v. Littell, 539 F.2d 882 (2 Cir. 1976); Martin Marietta Corp. v. Evening Star Newspaper, 417 F. Supp. 947, 954 (D.D.C., Flannery, J.); Hoffman v. Washington Post Co., 433 F. Supp. 600, 604-605 (D.D.C., Pratt, J.).

and the Courts of Appeals have sustained, procedural rules which enlarge the burden of a plaintiff in satisfying the requirement of establishing malice within New York Times. The effect in both cases, is to alter the balance between the interests of the victim of an allegedly defamatory publication and the publisher thereof, see Pet. 17-18, thereby approaching the result conveyed in the concurring opinions in New York Times rather than that of the majority. The difference between the cases is that in Herbert the permissible scope of discovery may be an open question, whereas in the present case the summary judgment rule applied by the Court below is squarely contrary to the prospects established and reaffirmed in the precedents of this Court.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-5414

ILYA WOLSTON,

Petitioner,

v.

THE READER'S DIGEST ASSOCIATION, INC., d/b/a READER'S DIGEST PRESS; BANTAM BOOKS, INC.; BOOK-OF-THE-MONTH CLUB, INC.; MACMILLAN BOOK CLUBS, INC.; JOHN BARRON,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 578 F.2d 427 and is reproduced in the Appendix at p.

117, *et seq.*[1] The opinion and order of the District Court granting defendants' motion for summary judgment is reported at 429 F. Supp. 167 and is reproduced at App. 93, *et seq.*

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on May 23, 1978 The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). An Order extending time to file the petition for writ of certiorari until September 21, 1978 was entered on August 7, 1978. The petition for certiorari was granted on Janury 8, 1979 (App. 131).

CONSTITUTIONAL PROVISION INVOLVED

First Amendment: "Congress shall make no law * * * abridging the freedom of speech, or of the press * * *."

QUESTIONS PRESENTED

I. Is a libel plaintiff necessarily a public figure subject to the rule of *New York Times Co.* v. *Sullivan*, 376 U.S. 254, because he had engaged in conduct which resulted in his becoming a defendant in a criminal proceeding?

[1] This Appendix will be hereinafter cited as "App." References to the record in the courts below to the extent not printed in the Appendix here will be cited as "CA App." or by other identifying reference.

II. In an action governed by *New York Times Co.* v. *Sullivan*, 376 U.S. 254, may a court grant summary judgment to the defendants by accepting the testimony of the author whose state of mind is at issue, and itself choosing among the conflicting inferences which can be drawn from that testimony and other evidence?

STATEMENT OF THE CASE

A. Nature of the Case and Proceedings Below

In 1974, Reader's Digest published the book *KGB: The Secret Work of Soviet Agents ("KGB")*, written by John Barron (App. 27, 53; CA App. 27). All editions of *KGB* published by Reader's Digest and reprint publishers contained the following defamatory statements relating to the petitioner, Ilya Wolston:

> *Among Soviet agents identified in the United States were* Elizabeth T. Bentley, Edward Joseph Fitzgerald, William Ludwig Ullmann, William Walter Remington, Franklin Victor Reno, Judith Coplon, Harry Gold, David Greenglass, Julius and Ethel Rosenberg, Morton Sobell, William Perl, Alfred Dean Slack, Jack Soble, *Ilya Wolston*, Alfred and Martha Stern.*

* No claim is made that this list is complete. *It consists of Soviet agents who were convicted of espionage or falsifying information or perjury and/or contempt charges following espionage indictments*, or who fled to the Soviet bloc to avoid

prosecution. (App. 28, emphasis added; see App. 5; CA App. 114).

In addition, the index to *KGB* contains the reference: "Wolston, Ilya, Soviet agent in U.S." (App. 29).

The statements identify Wolston as a Soviet agent, join his name with those infamous figures of Soviet espionage, and suggest that he had been indicted or convicted of espionage or perjury in connection with espionage investigations.

Wolston filed a libel suit in the United States District Court for the District of Columbia against the author, Reader's Digest, and the subsequent publishers of *KGB*, alleging that the statements were false (App. 3-6). The District Court granted the defendants' motion for summary judgment, and the Court of Appeals affirmed. The basis for granting summary judgment, insofar as it was affirmed by the Court of Appeals, was that Wolston was a public figure, required as a matter of law to establish "actual malice" by the defendants, and that the facts, including the testimony of the book's author with respect to his state of mind when he wrote the passages pertaining to Wolston, demonstrated that Wolston "could [not] show enough to go to a jury on the issue of actual malice" (App. 124).

B. Facts Pertaining to the Public Figure Issue

Ilya Wolston was the nephew of Jack and Myra Soble, who were arrested by the FBI in Janury 1957

on espionage charges and later pled guilty (App. 35, 36, 91). On June 28, 1958, Wolston was served at his residence in Washington, D.C. with a subpoena requiring his appearance in New York on July 1 before a federal grand jury investigating Soviet espionage in the United States (App. 36-37, 89, 92). Wolston had responded to several earlier subpoenas and had testified before the grand jury sitting in New York (App. 37, 86; CA App. 211). In addition, beginning with the arrest of the Sobles in January 1957, he had submitted to lengthy interrogations by the FBI not only in Washington, where he lived, but also in New York, where his appearance had been compelled by prior grand jury subpoenas (App. 91; CA App. 210-212). Indeed, Wolston had responded to the grand jury subpoena immediately preceding the subpoena of July 1st, only to be told on his arrival in New York that the grand jury would not be sitting that day. Instead, he was ushered into a room and subjected to further FBI interrogation (App. 91-92). After Wolston received the grand jury subpoena for July 1st, his wife arranged to contact the United States Attorney's Office in the Southern District of New York to inform it that Wolston was ill and might not be able to appear (App. 89; CA App. 218; see App. 91).[2] Wolston did not in fact appear in New York on July 1 (App. 92).

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[2] Representations with respect to Wolston's medical condition, supported by medical certificates, had previously been submitted in an effort to persuade the United States Attorney's Office and the FBI not to require him to travel to New York for

An order to show cause why he should not be held in contempt was issued, returnable on July 28. Wolston appeared in court on that date and offered to testify before the grand jury. The offer was rejected. A trial on the contempt charge was convened and his wife, then pregnant, was called to testify as to his mental condition on the return date of the subpoena. After she became hysterical on the stand, Wolston entered a plea of guilty. A one-year suspended sentence was imposed, conditioned on his cooperation with federal authorities, and he was placed on three-years' probation (App. 37, 92).

Brief newspaper stories relating to Wolston appeared in various Washington and New York newspapers during the six-week span between his failure to appear and sentencing: six on July 15 and one on July 16 reported his failure to appear before the grand jury and the issuance of the show cause order; three on July 29 reported the contempt hearing; two on August 8 reported the guilty plea; and three on August 14 reported the sentencing (App. 41-52).

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lengthy interrogations, but to accept his offer to submit to more frequent but shorter interviews in Washington (App. 91). Beginning with the illness and death of his daughter in 1956, Wolston had become extremely depressed and was under almost constant medical care (App. 91; CA App. 194, 195). At the time of service of the subpoena with which he did not comply, he was in the midst of extensive electro-shock treatments (CA App. 218)

C. Facts Pertaining to The Research and Writing of KGB

Prior to writing *KGB*, defendent Barron, then an associate editor of Reader's Digest, engaged in a prolonged feasibility study of a work on Soviet espionage (CA App. 34, 39-40). During the course of that study, Barron and other employees of Reader's Digest approached various foreign and domestic security and intelligence agencies to ask for their assistance (App. 9). The United States agencies contacted included the FBI, CIA and the State Department (App. 9). These agencies all indicated that they would cooperate with the author in his project (App. 11-13).

In January of 1969 Barron received authorization from Reader's Digest to proceed with the book (CA App. 54). He was given permission to travel extensively, to invest as much time and research as was necessary and to take maximum advantage of the world-wide research capacities of the Reader's Digest organization, which included what Barron described as "magnificant" facilities in New York and Paris and staff offices in many foreign countries, including Germany (App. 13-16). A professional researcher was assigned on a full-time basis to assist Barron and did so for over four years (App. 25-26). These aids to accuracy and depth of research were trumpeted in the preface to the book (Pl. Ex. 1 to the Deposition of John Barron, *KGB*, preface pp. xi, xii).

The research and writing of *KGB* took over four years (App. 14).

Barron testified at deposition that he possessed information about Wolston from two sources: a book entitled *My Ten Years As A Counterspy,* written by Boris Morros and published in 1959; and a report entitled "*Expose of Soviet Espionage*" prepared in May 1960 by the Federal Bureau of Investigation for transmittal to and publication by the Internal Security Subcommittee of the Senate Judiciary Committee (App. 17-18; CA App. 67, 89, 103-104; see CA App. 68).

Morros had been a Jack Soble confederate who later became a double agent for the FBI. In his book, Morros stated that Soble had told him of a certain "Slava" who supplied Soble with information, had described Slava as "tall, handsome, blond, a native-born American," and had eventually identified his nephew, Ilya Wolston, as Slava (App. 30-32). However, Morros pointed out that the only information he had pertaining to Wolston had come from Soble, whom he knew to be "a confirmed liar" (App. 34). Barron was "very familiar" with the Morros book and knew of Morros' characterization of Soble (App. 11, 25).

The FBI report similarly refers to "Slava," who is described as a "U.S. Army Colonel in Germany," states that Soble identified his nephew Wolston as Slava in 1955, and that following his guilty plea in April 1957, Soble "furnished information identifying Wolston as a Soviet Agent" (App. 82). The report also claimed that Wolston had been "dismissed" from

his State Department employment in Berlin in 1951, based upon his "probable identification" as "a Soviet agent" and data concerning "his black market activities" (App. 83).

While Barron admitted that he possessed information about Wolston from these two sources, he insisted that his sole source "for the purposes of documentation" was the FBI report (App. 18; see App. 54). While he stated by affidavit that he was aware at no time "of any fact that would give me reason to doubt the truth of the FBI Report or of any statement in it" (App. 54), he knew that at least part of the information about Wolston had come from Soble, that Morros expressed distrust of Soble's veracity, and that no action had been taken against Wolston relating to his alleged espionage activities despite the statements made in the report (App. 18, 25; CA App. 69-70). Although Barron testified that "[w]e wanted to be able to cite as frequently as possible our sources, so as to enable the reader to make his or her own judgment as to the credibility of what we were saying" (App. 8; see App. 53-54), he did not disclose his reliance on the Morros book (see App. 28-29, 53-54) and the fact that both of his sources had relied entirely or in major part on a confessed espionage agent and "confirmed liar."

Moreover, despite the seriousness of the statements concerning Wolston and notwithstanding that the information in the FBI report had been gathered during the emotion-laden period of the cold war when

false accusations of pro-Soviet activity and hysterical acceptance of such accusations were rampant, Barron chose to adopt without reservation the statement that Wolston was a Soviet agent (App. 18). He did so without utilization of the extensive research facilities available to him, without any inquiry of the federal agencies which had assured him of their willingness to cooperate, and without investigation of any kind (App. 16, 18, 26; CA App. 33, 73-74, 89-92). Inquiry would have established, among other things, that Wolston had not been "dismissed" by the State Department but had been terminated due to a reduction in force (CA App. 181), that Wolston had been employed by the Army Map Service following his purported identification as a Soviet agent (CA App. 192-193), and that the description of Slava as a U.S. Army Colonel did not mesh with Wolston's actual position as a low ranking civilian employee (see CA App. 173, 175-178).

D. Actions of the Courts Below

On this record, the courts below first concluded that Wolston was a "public figure". Then, according total acceptance to Barron's self-serving statements that he harbored no doubts as to the accuracy of the FBI report and did not intend to suggest that Wolston had been indicted and perhaps convicted of espionage (App. 127, 129 (Court of Appeals opinion); App. 114-115 (District Court Opinion)), determined that summary judgment should be granted, thereby depriving Wolston of an opportunity to have a jury

assess Barron's credibility and reach inferences with respect to the publication of these defamatory statements about petitioner different than the inferences drawn by the judges who considered the matter.

SUMMARY OF ARGUMENT

The degree of constitutional protection accorded for defamatory falsehood varies with the status of the person defamed. If a public official or "public figure" is defamed, liability may not be imposed in the absence of actual malice *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964); *Curtis Publishing Co.* v. *Butts* and *Associated Press* v. *Walker*, 388 U.S. 130 (1967). If a non-public individual is defamed, actual malice need not be established, but liability may not be imposed in the absence of fault. *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 347-348 (1974). While there are two categories of "public figures" (*id.* at 345), only one was relied on by defendants below: that some persons' conduct is such that they become public figures with respect to particular controversies.

The lower courts held that petitioner, Ilya Wolston, was such a "limited-issue" public figure because he failed to respond to a grand jury subpoena requiring his apperance before a federal grand jury investigating espionage, and was subsequently convicted of contempt. "Limited-issue" public figures, however, are those who strive for exposure and take action for the purpose of impacting upon society with respect to a particular public controversy. They may be deemed

to have waived their interest in privacy and to have assumed the risk of defamatory falsehood by virtue of seeking public attention in an attempt to attain their goal. Because they seek to influence, the public has an interest in assessing their views, actions and background, and the actual malice standard allows the media substantial "breathing space" in meeting this interest.

Under these principles, petitioner may not properly be found to be a public figure. He did not purposefully seek to engage the public's attention for the purpose of influencing society's views with respect to some public issue.

Even if petitioner is a public figure and the actual malice standard applies, entry of summary judgment was plainly inappropriate. For liability turns on the state of mind of the defendants; and questions of credibility and, even in a libel case, inferences to be drawn from the evidence are for the jury, not the trial judge or the court of appeals. *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962); *Agosto* v. *Immigration and Naturalization Service*, 436 U.S. 748 (1978).

Moreover, the Court of Appeals applied a special rule in granting summary judgment, ostensibly to protect the First Amendment interest articulated in *New York Times*. This rule, however, is unsupported by that case and its progeny, and its application distorts the balance this Court established in *Gertz* between uninhibited debate on public issues and the countervailing societal interest in protecting reputation from defamatory falsehood.

ARGUMENT

I.

Petitioner Is Not a Public Figure

A. In a line of cases beginning with *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), this Court has established the constitutional parameters of liability for defamatory falsehood concerning matters of public interest where the statements themselves carry a warning of their defamatory potential. *New York Times* held that when a public official is defamed, liability may not be imposed in the absence of clear and convincing proof of "actual malice," *i.e.*, knowledge that the statement was false or reckless disregard as to its truth or falsity. *Id.* at 279-280. Three years later in the companion cases of *Curtis Publishing Co.* v. *Butts* and *Associated Press* v. *Walker*, 388 U.S. 130 (1967), the standard of proof required of public officials was extended to "public figures", persons who while they do not hold office "are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large." *Id.* at 164 (Warren, C.J., concurring in result). And in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974), the Court distinguished between two types of "public figures": those who "occupy positions of such persuasive power

and influence that they are deemed public figures for all purposes" and those who "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." *Id.* at 345. The latter are deemed public figures only with respect to those particular controversies. But in either case the emphasis is upon the public figure as persuader, as influencer, who "invite[s] attention and comment"—attention and comment being essential to his purpose. *Id.*

Extension of the *New York Times* privilege as to such persons has been justified in that they have some of the characteristics of public officials which create a public interest in free criticism. Like public officials, they ordinarily have "access to the channels of effective communication," *Gertz,* 418 U.S. at 344, and because of this access they can "influence policy and * * * counter criticism of their views and activities." *Butts,* 388 U.S. at 164 (Warren, C.J., concurring in result). Like public officials, they may also be said to have relinquished their interest in privacy in order to attain a goal, and to have assumed the risk of defamatory falsehoods by virtue of seeking public attention as the necessary consequence of their public involvement. *Gertz,* 418 U.S. at 344-345.[3] They have

[3] Their interest in access to the press is in fact aided by application of the actual malice standard, which, by granting substantial "breathing space," encourages the press to cover their ideas and activities. See *Rosenbloom* v. *Metromedia, Inc.,* 403 U.S. 29, 47 n.15 (1971).

voluntarily assumed "an 'influential role in ordering society.'" *Id.* at 345, *quoting Butts,* 388 U.S. at 164 (Warren, C.J., concurring in result).

By virtue of their influence on public issues, such persons' views and actions are of as much concern to citizens as the attitudes and behavior of public officials. *Butts,* 388 U.S. at 162 (Warren, C.J., concurring in result). The public has an interest in assessing the positions they espouse, and the media concomitantly require substantial "breathing space" in fulfilling this interest. Indeed, because such persons do not hold public office and are therefore "not subject to the restraints of the political process," "public opinion may be the only instrument by which society can attempt to influence their conduct." *Id.* at 164 (Warren, C.J., concurring in result).

For example, General Walker's public advocacy on radio and television against federal intervention to effectuate desegregation was "purposeful activity amounting to a thrusting of his personality into the 'vortex' of an important public controversy." *Id.* at 155 (opinion of Harlan, J.); see *id.* at 162, 165 (opinion of Warren, C.J., adopted in opinion of Brennan, J. at 172); *Gertz,* 418 U.S. at 352. In contrast, Elmer Gertz was not deemed to be a public figure despite many publications on issues of general importance (*Gertz* Appendix at 154-157), numerous public appearances in Chicago and other cities (*Gertz* Appendix at 103-106) and long involvement in community and professional affairs. Further, his representation of a

client in a wrongful death action against a police officer who had been indicted for murder and was subsequently convicted, and his appearance at the coroner's inquest did not inject him into the forefront of the public controversy surrounding the death or police activities in a manner which would make him a public figure for purposes of those limited issues. Similarly, Mrs. Firestone, despite her notoriety in Palm Beach society, her status as a party to a well-publicized matrimonial action, and her "non-domesticated" conduct which contributed to the public interest in that matrimonial action, was held not to be a public figure since she had not achieved general fame or voluntarily injected herself into the forefront of a public controversy to influence its outcome. *Time, Inc.* v. *Firestone*, 424 U.S. 448 (1976). Even her holding of press conferences was held insufficient to alter her status because she did not seek to use them as a vehicle to impact upon issues of public concern. *Id.* at 454-455 n.3.

Gertz and *Firestone* recognize that a person's private status cannot be lost by merely performing an act which results in media exposure. Particularly, the mere fact that a person's actions bring him into court is insufficient to make him a public figure.

> [T]he majority [of participants in litigation] will more likely * * * [be] drawn into a public forum largely against their will in order to attempt to obtain the only redress available to them or *to defend themselves against actions brought by the State* or by others. There appears little reason why these individuals should substantially forfeit that degree of protection which the law of defamation would otherwise afford them simply by virtue of their being drawn into a courtroom. (*Firestone*, 424 U.S. at 457, emphasis added).

Firestone teaches that publicity generated by state action, or by virtue of a requirement that state processes be utilized, must be disregarded in determining whether an individual involved in the proceeding is a public figure. Instead, analysis must be focused on that person's own acts to determine whether they may be deemed to have been designed to draw public attention for the purpose of influencing the public's views on public issues.

B. Purporting to follow the principles of *New York Times, Gertz* and *Firestone*, the Court of Appeals improperly held that Ilya Wolston had lost his status as a private person merely because—sixteen years prior to publication of respondents' book—he had failed to respond to one grand jury subpoena and was subsequently convicted of contempt.[4] As the District Court

[4] By failing to appear before the grand jury Wolston invited public attention and comment. Until that failure occurred he enjoyed obscurity in the wings, but by subjecting himself to a citation for contempt he voluntarily stepped center front into the spotlight focused on the investigation of Soviet espionage. In short, by his voluntary action he invited attention and comment in connection with the public questions involved in the investigation of espionage. (App. 122-123 (Court of Appeals opinion); see App. 107-110 (District Court opinion)).

recognized, Wolston never sought to engage the public's attention: "Ilya Wolston apparently led a thoroughly private existence and was generally unknown before receiving his first subpoena, early in 1957, and after that as well, until his failure to appear before the special grand jury became public knowledge. After the flurry of publicity attending his conviction ceased, he apparently succeeded, for the most part, in resuming his private ways" (App. 103, footnote omitted; see App. 104-105, 108-109). He was drawn into the controversy over espionage only because the federal government sought to interrogate him.

Wolston's failure to respond to the July 1 subpoena was in no way designed to draw attention to himself so as to invite public comment or to influence the public with respect to any issue. He did not hold a press conference. He did not issue a statement challenging the power of the Government to investigate his or others' activities. He did not make a public plea to arouse public sentiment against the harassment he was suffering at the hands of the State. Rather, the

Subsequent disposition of a criminal charge must be disregarded as relevant to a person's status as a public figure, although it may have a bearing on the truth of the defamatory statements. See *Anderson* v. *Stanco Sports Library*, 542 F.2d 638 (4 Cir. 1976). To hold that an act which results in prosecution *ipso facto* subjects the actor to the burden of proving actual malice in a libel action would mean that many persons later vindicated by acquittal will lose the protections the libel laws otherwise afford, while those later found guilty would be subject to sanctions in addition to those found sufficient by the State.

facts suggest no more than that Wolston—mentally ill, anxious and depressed—simply failed to go to New York on July 1, 1958, hoping that he would be allowed to withdraw or at least minimize his role in the ongoing investigation. Under the teachings of this Court, Wolston could not acquire "public figure" status merely because, as the lower courts found, one could impute to him the knowledge that his failure to appear would invite public attention and comment.[5]

Were it otherwise, the rejected rule of the plurality opinion in *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29 (1971), would re-enter by the back door, for as Mr. Justice Brennan there recognized, "'[e]xposure of the self to others in varying degrees is a concomitant of life in a civilized community.'" 403 U.S. at 47.[6]

[5] Moreover, if one were to adopt a rule of law that whether or not a libel plaintiff is a public figure turns on whether he knew or should have known that his actions were likely to produce publicity, constitutional privilege would turn on an amorphous test involving not only reasonable expectancies with respect to the course of action taken, but also reasonable expectancies with regard to alternatives. For example, in this case repeated appearances by Wolston before a grand jury known to be investigating espionage were not likely to remain unnoticed. In the era of the investigative reporter, any involvement in a grand jury investigation is likely to produce publicity, all too often even with respect to the testimony given to the grand jury. Further, if Wolston had sought to quash the subpoena for prosecutorial abuse, publicity would have undoubtedly ensued.

[6] The District Court made this error when it held Wolston was a public figure despite its recognition that he did not purposefully seek to engage the public's attention (see App. 104-105, 108-109).

In rejecting *Rosenbloom*, this Court has made it clear that one may become associated with an issue before the public without *ipso facto* losing one's status as a private individual. Rather, one becomes a public figure only through action undertaken with a view to impacting upon a public controversy in order to influence its resolution.

To hold that Wolston's failure to appear was not for the purpose of influencing the public's views with regard to the espionage controversy does not require a determination of his subjective intent. Rather, the objective indicia of his intentions compel this result: his ready submission to lengthy FBI interrogation despite his illness; his prior appearance before the grand jury; the representations as to his medical condition, supported by medical certificates; his offer to submit to more frequent but shorter interviews in Washington; and his subsequent offer to testify again before the grand jury. There was no indication whatever that Wolston intended to have any impact on the public. The publicity generated at the time by his failure to appear reveals his attempt to remain a private man: the newspapers reported his *disappearance* from public view (App. 41, 42, 44); his attempt to *avoid* appearing before the grand jury because of *illness* (App. 43, 46, 47, 48, 49, 51, 52); and the fact that, "[r]eached at home, Wolston denied knowledge of either the July 1 subpoena or the 'show-cause' order. *He would not comment further*" (App. 48, emphasis added).

If Wolston is not stamped a public figure, this does not mean the imposition of "strict liability" upon defendants which "may lead to intolerable self-censorship", for *Gertz* requires proof of "fault" as the minimum basis for liability for "defamatory falsehood injurious to a private individual" (418 U.S. at 340, 347). That is the accommodation between the societal values of avoidance of "self-censorship by the news media" and the protection of the "'essential dignity and worth of every human being'" by providing "compensation of individuals for the harm inflicted on them by defamatory falsehood" (*id.* at 341) which is appropriate in this case.

II.

Even If Petitioner Was Properly Deemed To Be A Public Figure, The Courts Below Erred In Granting Summary Judgment To The Defendants On The "Malice" Issue

A. Under *New York Times*, once the plaintiff has been determined to be a public official or public figure, he must show that the defendant published the defamatory statement "with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. at 279-280. Liability thus turns on the state of mind of the defendant. In determining that the defendants were entitled to summary judgment on the malice issue, the courts below accepted as true the disposition testimony and affidavit of the defendent Barron, the au-

thor of *KGB*, which describes his writing of the book and his own thinking with respect to the defamatory statements about Wolston contained therein.

Both the District Court and the Court of Appeals relied heavily on the statements of Barron's affidavit:

> I was confident upon publication of *KGB* that the book as a whole and each and every statement in it were true, and I was aware of no fact that tended to make me doubt the truth of the book or of any statement in it. * * * At no time have I been aware of any fact that would give me reason to doubt the truth of the FBI Report or any statement in it. (App. 54, *quoted at* App. 127 (Court of Appeals opinion); see App. 114 (District Court opinion)).

And both courts below discussed to some length why they believed that the evidence presented on the motion supported the conclusion that Barron's reliance on the FBI report was reasonable, notwithstanding Morros' characterization of Soble and Barron's failure to check Wolston's employment record with the State Department or to make any other inquiry (App. 127-129 (Court of Appeals opinion); App. 114-115 (District Court opinion)).

The District Court "agree[d] with Wolston that the footnote at page 188 of the Reader's Digest edition of *KGB* appears to state falsely that he was indicted for espionage"; yet the court said, "Nevertheless, the statement is ambiguous; Barron's explanation of it is plausible and, in the court's opinion, offered in good

faith" (App. 115). The Court of Appeals compounded this error when, after quoting, and apparently crediting Barron's explanation it added: "We must agree with Wolston that the second sentence of the note is imprecise and ambiguous, and might be read as an awkward and involuted statement that he was indicted; but we think it does not follow as a reasonable inference that in writing it Barron was reckless or acted in bad faith" (App. 129).

The decisions of this Court have made it entirely clear that questions of credibility are not to be resolved on summary judgment. In *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962), the Court said:

> We look at the record on summary judgment in the light most favorable to Poller, the party opposing the motion, and conclude here that it should not have been granted. We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of "even handed justice." (*Id.* at 473, footnote omitted).

Poller is especially in point because under the *New York Times* standard the defendant's state of mind is the focus of inquiry.

These principles were emphatically reaffirmed at the last Term in *Agosto* v. *Immigration and Naturalization Services,* 436 U.S. 748, 756-757 (1978):

> [J]ust as a district court generally cannot grant summary judgment based on its assessment of the credibility of the evidence presented, see *Poller* v. *Columbia Broadcasting System, Inc.,* 368 U.S. 464, 467-468 (1962), 6 J. Moore, Federal Practice ¶ 56.02[10], p. 56-45 (2d ed. 1976), so too a court of appeals is not at liberty to deny an individual a *de novo* hearing on his claim of citizenship because of the court's assessment of the credibility of the evidence * * *. Particularly where the evidence consists of the testimony of live witnesses concerning material factual issues, it will seldom if ever be appropriate to deny a *de novo* hearing, since "[i]t is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised." *Poller* v. *Columbia Broadcasting System, Inc., supra,* at 473.

It is also well established that " '[o]n summary judgment the inferences to be drawn from the underlying facts contained in [the moving party's] materials must be viewed in the light most favorable to the party opposing the motion.'" *Adickes* v. *S.H. Kress and Co.,* 398 U.S. 144, 158-159 (1970), *quoting United States* v. *Diebold, Inc.,* 369 U.S. 654, 655 (1962).

B. It is clear from the foregoing that if the defendants' motion for summary judgment had been measured by the usual tests, it would have been denied. However, the Court of Appeals for the District of Columbia Circuit has developed a special rule for determining whether summary judgment should be granted in defamation cases where the standard of liability is governed by *New York Times Co.* v. *Sullivan.*

In Washington Post Co. v. *Keogh,* 365 F.2d 965, 968 (D.C. Cir. 1966), *cert. denied,* 385 U.S. 1011 (1967), which was cited by the court below in introducing its discussion of the malice issue (App. 124), the court, after describing the important functions of summary judgment, stated: "In the First Amendment area, summary procedures are even more essential. For the stake here, if harassment succeeds, is free debate." Judge Wright, the author of that opinion, reaffirmed and enlarged upon those views in *Wasserman* v. *Time, Inc.,* 424 F.2d 920 (D.C. Cir.), *cert. denied,* 398 U.S. 940 (1970). On behalf of himself and Circuit Judge Robinson, he wrote (*id.* at 922):

> In my judgment New York Times Co. v. Sullivan makes actual malice a constitutional issue to be decided in the first instance by the trial judge applying the *Times* test of actual knowledge or reckless disregard of the truth. *Cf.* Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964). Unless the court finds, on the basis of pretrial affidavits, depositions or other documentary evidence, that the plantiff can prove actual malice in the *Times* sense, it should

> grant summary judgment for the defendant. Washington Post Co. v. Keogh, 125 U.S.App.D.C. 32, 365 F.2d 965, 20 A.L.R. 3d 972 (1966), cert. denied, 385 U.S. 1011, 87 S.Ct. 708, 17 L.Ed.2d 548 (1967). Compare Goldwater v. Ginzburg, 2 Cir., 414 F.2d 324, 336-337 (1967), cert. denied, 396 U.S. 1049, 90 S.Ct. 701, 24 L.Ed.2d 695 (1970).

But the Court of Appeals for the Ninth Circuit has expressly disagreed with the District of Columbia Circuit. In *Guam Federation of Teachers, Local 1581, A.F.T.* v. *Ysrael*, 492 F.2d 438 (9 Cir.), *cert. denied*, 419 U.S. 872 (1974), the court said:

> We agree with our brothers of the District of Columbia and Fifth Circuits[7] that it is important that judges focus attention on the summary judgment, directed verdict and judgment notwithstanding the verdict procedures in libel actions. When civil cases may have a chilling effect on First Amendment rights, special care is appropriate. Thus, a judicial examination at these stages of the proceeding, closely scrutinizing the evidence to determine whether the case should be terminated in a defendant's favor, provides a buffer against possible First Amendment interferences. The Supreme Court has instructed trial courts to "examine for [themselves] the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect." To be unprotected, actual malice must be shown with "convincing clarity." *New York Times, supra*, 376 U.S. at 285-286, 84 S.Ct. at 728-729.

[7] The Court's reference here is to the decision in *Bon Air Hotel, Inc.* v. *Time, Inc.*, 426 F.2d 858, 864-865 (5 Cir. 1970), where the court had cited and quoted from *Wasserman* with approval. However, the Ninth Circuit observed in *Ysrael*: "We note that this language [in *Bon Air Hotel*] does not include a reweighing of the evidence, including credibility of witnesses: it merely states the usual rule to be followed when summary judgment is involved." 492 F.2d at 440.

However, with respect, we are not persuaded by the second phase of Judge Wright's analysis in *Wasserman* which suggests that in deciding these motions, the trial court should judge the credibility of witnesses and draw its own inferences from the evidence. We think that in a libel case, as in other cases, the party against whom a motion for summary judgment, a motion for a directed verdict, or a motion for a judgment notwithstanding the verdict is made is entitled to have the evidence viewed in the light most favorable to him and to all inferences that can properly be drawn in his favor by the trier of fact. We think, too, that in such cases it is not only not the duty of the judge, or of this court of appeal, to weigh the credibility of the evidence, or to draw inferences in favor of the moving party (except, of course, when no contrary inference can legitimately be drawn), but that neither the judge nor this court on appeal has the authority to weigh credibility or to choose among legitimate inferences in such cases.

The *standard* against which the evidence must be examined is that of *New York Times* and its progeny. But the *manner* in which the evidence

> is to be examined in the light of that standard is the same as in all other cases in which it is claimed that a case should not go to the jury. If the evidence, so considered, measures up to the *New York Times* standard, the case is one for the jury, and it is error to grant a directed verdict, as the trial judge did in this case. (*Id.* at 441, emphasis in original).

The Ninth Circuit then examined with care the authorities on which Judge Wright had relied in *Wasserman* and concluded that none supports his thesis. We note particularly what the court said about this Court's opinion in *New York Times:*

> We find nothing in this language in indicate that the Court's examination was to disregard the usual rules for determining whether a case should go to the jury. It merely requires a reexamination as to whether the evidence, viewed most favorably to the plaintiff, is sufficient to meet the *New York Times* standard if the jury accepts it. (492 F.2d at 442).

The court also observed that in cases subsequent to *New York Times* where this Court examined the evidence to determine whether there was sufficient proof of malice to permit the case to go to the jury, it did not decide the credibility of witnesses or select between permissible inferences. 492 F.2d at 442-443, discussing *Rosenblatt* v. *Baer,* 383 U.S. 75 (1966). *Time,*

Inc. v. *Hill,* 385 U.S. 374 (1967) and *Beckley Newspapers Corp.* v. *Hanks,* 389 U.S. 81 (1967).[8]

The Ninth Circuit's demonstration that, contrary to the view of the District of Columbia Circuit, *New York Times* and its progeny address only the "*standard* against which the evidence must be examined" but not "the *manner* in which the evidence is to be examined in the light of that standard" (492 F.2d at 441, emphasis in original) is so sound, and states the position so accurately, that we need offer only one additional thought.

The *New York Times* standard represents an accommodation between "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open" (376 U.S. at 270) and the countervailing societal interest in protecting the reputations of individuals from the harm inflicted on them by defamatory falsehood. As stated in *Gertz,* 418 U.S. at 341:

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[8] The court commented also on three Court of Appeals decisions which had been cited in *Wasserman.* The court found in *Washington Post* v. *Keogh, supra,* "no hint that the court of appeals was making its own judgment as to credibility." 492 F.2d at 443. However, since that opinion had been written by Judge Wright himself, we may assume that he understood what was there intended when he cited *Keogh* in *Wasserman.* The *Ysrael* court was, however, correct in stating that *Goldwater* v. *Ginzburg,* 414 F.2d 324 (2 Cir. 1969), *cert. denied,* 396 U.S. 1049 (1970) and *Time, Inc.* v. *Ragano,* 427 F.2d 219 (5 Cir. 1970). "appl[y] the normal rule". 492 F.2d at 443.

> The need to avoid self-censorship by the news media is, however, not the only societal value at issue. If it were, this Court would have embraced long ago the view that publishers and broadcasters enjoy an unconditional and indefeasible immunity from liability for defamation. See *New York Times Co.* v. *Sullivan*, *supra*, at 293 (Black, J., concurring); *Garrision* v. *Louisiana*, 379 U.S., at 80 (Douglas, J., concurring); *Curtis Publishing Co.* v. *Butts*, 388 U.S., at 170 (opinion of Black, J.). Such a rule would, indeed, obviate the fear that the prospect of civil liability for injurious falsehood might dissuade a timorous press from the effective exercise of First Amendment freedoms. Yet absolute protection for the communications media requires a total sacrifice of the competing value served by the law of defamation.

The District of Columbia Circuit's special summary judgment rule for cases governed by *New York Times* makes it considerably more difficult for a plaintiff even to obtain a trial on the malice issue than if the usual and accepted summary judgment procedures were applied. Particularly because the *New York Times* standard calls for an inquiry into the defendant's state of mind, as to which the defendant can usually, if not always, provide self-serving deposition testimony and affidavits, which the plaintiff can rebut only by requesting the trier of fact to draw from the objective evidence the inference that the denial is untrue, *cf. Morissette* v. *United States*, 342 U.S. 246, 276 (1952), the court has erected an obstacle which,

as this case starkly illustrates, few defamed plaintiffs will be able to surmount. This result comes perilously close to providing the publishers of defamatory falsehoods with the absolute immunity proposed by a minority of the court in *New York Times*, *Garrison* v. *State of Louisiana*, 379 U.S. 64 (1964), and *Butts*, and thereby sacrifices "the individual's right to the protection of his own good name [which] 'reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty.'" *Gertz*, 418 U.S. at 341, *quoting Rosenblatt* v. *Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring).

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed and the case remanded for a trial on the merits.

Respectfully submitted,

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FOR ARGUMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-5414

ILYA WOLSTON,
Petitioner,

v.

THE READER'S DIGEST ASSOCIATION, INC., D/B/A READER'S DIGEST PRESS; BANTAM BOOKS, INC.; BOOK-OF-THE-MONTH CLUB, INC.; MACMILLAN BOOK CLUBS, INC.; JOHN BARRON,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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BRIEF FOR RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (App. 117-130) is reported at 578 F.2d 427. The opinion of the district court (App. 93-116) is reported at 429 F. Supp. 167.

JURISDICTION

The judgment of the court of appeals was entered on May 23, 1978. This Court extended the time for filing a petition for a writ of certiorari to and including September 21, 1978. The petition was filed on September 18, 1978, and was granted on January 8, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution: "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

QUESTIONS PRESENTED

1. Whether petitioner was correctly held to be a public figure under *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974) and *Time, Inc.* v. *Firestone*, 424 U.S. 448 (1976), for the limited range of issues involved in this case.

2. Whether summary judgment was properly granted in respondents' favor on the issue of whether the allegedly libelous statement was published with "actual malice," that is, "with knowledge that it was false or with reckless disregard of whether it was false or not," as required by *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 271-72 (1964), and its progeny.

STATEMENT

A. Introduction

This is a libel action seeking damages against the author, John Barron, and the respondent publishers of a book entitled *KGB: The Secret Work of Soviet Secret Agents*

(hereinafter *KGB*). Respondent The Reader's Digest Association, Inc. (Reader's Digest) is the initial publisher of *KGB*, and respondents Bantam Books, Inc., The Book-of-the-Month Club, Inc., and Macmillan Book Clubs, Inc. are subsequent publishers under contractual arrangements with Reader's Digest. The complaint filed by the petitioner, Ilya Wolston, alleged that *KGB* contained false and defamatory statements to the effect that he had been identified as a Soviet agent and that he had been indicted for espionage.

The district court granted respondents' motion for summary judgment. It held that petitioner was a public figure with regard to the limited range of issues relating to Soviet espionage in the 1940's and 1950's, so that, to recover for defamatory falsehood, he would have to prove that respondents published the challenged statements with "actual malice." The court further held that there was no genuine issue in that regard and that petitioner could not make the showing required by *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279-280 (1964), and *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974). (App. 114). The court of appeals affirmed. (App. 117).

B. Background Regarding Petitioner's Status As A Public Figure For The Limited Range of Issues Regarding Soviet Espionage

Petitioner, Ilya Wolston, was born in Russia in 1918. After living in Lithuania, Germany, France, and England, he emigrated to the United States in 1939 and became a naturalized citizen in 1943. (CA App. 157-160).[1] In 1942, Wolston was drafted into the United States Army and attended the U.S. Army Intelligence School at Camp Ritchie, Maryland, where he was trained as a military

[1] The Appendix filed with the Court will be cited as "App." References to the record as contained in the appendix filed in the court of appeals will be cited as "CA App."

intelligence interpreter. (CA App. 168-169). Thereafter he served mainly in Alaska as liaison to Soviet military personnel. In 1945, he was assigned to San Francisco as an interpreter and liaison to the Soviet airplane crews bringing the Soviet delegation to the United Nations Conference on International Organization. (CA App. 171-172). Following his discharge in 1946, he obtained a position as an interpreter in Germany for the United States Military Government and later for the Department of State in Allied-occupied Berlin. (CA App. 175-177). Wolston eventually became a liaison officer to the Political Advisor of the U.S. High Commissioner of Germany and was responsible for the travel of American diplomats stationed in U.S. embassies in Moscow and Warsaw, a position requiring him to deal with the Soviet consulate. (CA App. 176-180).

In 1951, the Department of State terminated Wolston's employment. On his return to the United States, Wolston worked as a clerk, then enrolled in an undergraduate program, and in 1955 moved to Washington, D.C. to work for several months as a translator for the Army Map Service and finally as a free-lance translator until 1957. (CA App. 180-182, 188-195).

During 1957 and 1958, a special federal grand jury convened in the Southern District of New York was conducting a major investigation into the activities of Soviet intelligence agents in the United States. The grand jury's inquiry was the outgrowth of an intensive, ten-year investigation by the Federal Bureau of Investigation into Soviet espionage. That investigation culminated on January 25, 1957, in the disclosure of an espionage ring in New York City and in the FBI's arrest on that day of Wolston's aunt and uncle, Myra and Jack Soble, on charges of conspiring to commit espionage. On February 4, 1957, the special federal grand jury indicted the Sobles on five counts charging espionage, conspiracy,

and violation of the Registration Acts. On April 10, 1957, the Sobles pleaded guilty to espionage charges and thereafter cooperated with the government by testifying before the grand jury. Jack Soble was later sentenced to seven-years' imprisonment and Myra Soble was sentenced to four years. (App. 78-80, 86). In the ensuing months the FBI investigation focused on other participants in the Soviet espionage ring, resulting in further espionage indictments, convictions, and guilty pleas. (App. 78-90).

On the day of the Sobles' arrest, the FBI interviewed Wolston at his home. Shortly thereafter, the grand jury, pursuing its inquiry into the activities of those in close contact with Jack Soble, subpoenaed Wolston, who appeared before it in early 1957. (App. 85-86, CA App. 209-214). After the Sobles entered guilty pleas and offered cooperation in the investigation, the grand jury's efforts to obtain further testimony from Wolston proved unsuccessful. (App. 85-90, CA App. 75). For over fourteen months, notwithstanding a number of subpoenas, Wolston failed to appear. (App. 85-90). Finally, on June 23, 1958, a subpoena was issued for Wolston's appearance on July 1, 1958. The day before Wolston's scheduled appearance, the Assistant United States Attorney conducting the investigation informed Wolston's counsel that if Wolston had any reasons for not testifying, he should make them known to the grand jury or the court. He warned that, should Wolston fail to appear, the government would take appropriate measures to punish his refusal to comply with the subpoena. (App. 89).

Wolston nevertheless failed to respond to the subpoena. The United States District Court for the Southern District of New York thereupon issued a show cause order, and on August 7, 1958, following a hearing on the matter, Wolston pleaded guilty to the charge of criminal contempt. (App. 36-37, 82-83). On August 13, 1958, Wolston

received a one-year suspended sentence and was placed on probation for three years on the condition that he be available for any further grand jury inquiries regarding Soviet espionage. (App. 83).

The affidavit of Assistant U.S. Attorney Herbert C. Kantor, submitted in the contempt proceeding, recounted Wolston's prior failures to respond to grand jury subpoenas for more than a year and concluded that "Wolston's actions demonstrate deliberate disregard for the process of this Court." (App. 86-89). He noted that Wolston's conduct resulted in "Wolston's avoiding testifying before this Grand Jury" because its statutory period had expired, and called attention to the "numerous occasions in which Wolston caused the Grand Jury to convene and stand idle." (App. 89-90). He pointed out that Wolston's sudden offer to appear before the grand jury, first made on the day of the contempt proceeding, July 28, was "meaningless" because of the expiration of the grand jury's term on that day. (App. 90).

Wolston's criminal evasion of the grand jury subpoena and the contempt proceedings against him attracted public attention and were immediately the subject of at least fifteen newspaper articles, both in Washington, D.C., where he lived, and in New York, where the grand jury was sitting. (App. 41-52). The articles focused on Wolston's efforts to resist the grand jury subpoena and on the United States District Court's show cause order. Reflecting the public's continuing interest in the grand jury's investigation of Soviet espionage activities, and in Wolston's relationship to the confessed spy Jack Soble, the stories bore captions such as "Spy Inquiry Hunts Nephew of Soble," "Hunt Soble Kin for Spy Data," "Soble Nephew Facing Jail in Spy Quiz Snub," "Soble Nephew Faces Rap for Probe Dodge," "Court Calls Spy's Nephew," and "Kin of Soble Faces Quiz on Contempt." (App. 41-48).

The articles noted that Jack Soble had pleaded guilty to "heading a spy ring that sent vital government secrets to the Soviet Union," that his wife "also was jailed for spying," and that Wolston was their nephew. (App. 45). The stories reported statements by Assistant United States Attorney Kantor that Wolston had been in contact with the Sobles in Europe and the United States for a long time before the FBI arrested them in January 1957. (App. 41-42). Three of the articles reported a statement by Kantor that Wolston was believed to have material information about a "general criminal conspiracy against the United States." (App. 41-42, 44-49).

The newspapers also reported that the federal judge presiding at the contempt hearing commented that "there is no question in my mind that there was a studied attempt [by Wolston] to avoid [an] appearance before this grand jury." (App. 48, 52). Other news articles stated that, according to Kantor, Wolston had ignored five prior subpoenas issued by the special federal grand jury and had "showered [Kantor's] office with letters from physicians, telephone excuses and visits from his wife." (App. 43).

News articles were later published about Wolston's guilty plea, sentence, and probation. (App. 50-52). The articles described him as a "former Army intelligence specialist and liaison man with the Soviet occupation forces in Germany" (App. 50) and again noted that "Wolston had been in frequent contact with [Jack] Soble both in the U.S. and in Europe before Soble's arrest as head of a spy ring." (App. 52). In sum, Wolston's activities and criminal conduct in relation to the special federal grand jury's investigation attracted extended public comment and attention.

In subsequent years these matters continued to be the subject of public discussion. In 1959, a book written by

Boris Morros entitled *My Ten Years As a Counterspy* was published by Viking Press, Inc. (App. 30). Morros, a confessed Soviet espionage agent who later worked for the FBI, had been a former confederate of Jack Soble. In his book, Morros identified Wolston as a Soviet espionage agent in the United States. According to Morros, Soble claimed than an individual who had operated in Germany under the code name "Slava" had supplied him with information valuable to the Soviets. "Slava" was said to have rendered services to the Soviets in Alaska, among other places, and in connection with the formation of the United Nations in 1945, at least once accepting money from the Soviet spy ring's agent in San Francisco. (App. 31). Morros stated that, in the fall of 1954, Soble identified Ilya Wolston as "Slava." Morros added, however, that he knew nothing about Wolston's activities except what Soble, "a confirmed liar," had told him. (App. 34). The book also recited that Wolston had failed to respond to six grand jury subpoenas and that he had pleaded guilty and had received a one-year suspended sentence. (App. 34). Approximately 12,500 hard-cover copies and 141,000 paperback copies of the Morros book were printed. (CA App. 348).

In 1960, the FBI completed a report entitled "Exposé of Soviet Espionage, May 1960." (App. 55). By direction of the Attorney General, the FBI report was transmitted to the Internal Security Subcommittee of the Senate Judiciary Committee for use by its Subcommittee to Investigate the Administration of the Internal Security Act. In July of 1960, the Subcommittee ordered the FBI report to be printed as a "Senate document" and described the report as "a summary of known Soviet espionage cases in the United States over the past fifteen years." (App. 56). It further directed that thirteen thousand copies be printed. In the Appendices, the FBI report set forth cases presented to federal courts "which unquestionably reveal Soviet efforts to steal American secrets affecting the

national security of this country." (App. 78). On page 24, in a section entitled the "Jack Soble Case", the report stated that an FBI investigation resulted in identifying Ilya Wolston as a Soviet intelligence agent:

"F. *Jack Soble Case*

> In the early 1940's the FBI was conducting an intensive investigation into the activities of Vassili Zubilin (true name , Vassili Mikhailovich Zarubin), Third Secretary of the Soviet Embassy, Washington, D.C. Zubilin had entered the United States on December 25, 1941, with his wife, Elizabeth, and son, Peter. The investigation disclosed that Zubilin had been an important Soviet intelligence agent for many years. During 1934-1937, he was in the United States on several occasions utilizing an American passport fraudulently obtained under the name of Edward Joseph Herbert.
>
> The first break in the FBI investigation came when in the Spring of 1943, Zubilin, while under physical surveillance by the FBI, was observed to contact Boris Michael Morros, a motion-picture producer in Hollywood. After extensive investigation into the activities of Morros, he was interviewed by the FBI in July, 1947 and admitted he was recruited by Zubilin for Soviet intelligence activities. Morros, thereafter, agreed to operate as a double agent against the Soviets under the direction of the FBI. Thus began an operation of intrigue which led to the expose [sic] of a Soviet espionage ring in New York City culminated by the arrest on January 25, 1957, by FBI Agents of Jack Soble, Myra Soble and Jacob Albam on charges of conspiring to commit espionage. *In addition, the*

FBI investigation resulted in identifying as Soviet intelligence agents, Jane and George Zlatovski, who were indicted on July 8, 1957, charged with espionage conspiracy; Alfred and Martha Stern, who were indicted on September 9, 1957, on two counts charging espionage conspiracy; *Ilya Wolston, who was charged with contempt for failing to appear before a grand jury and on August 7, 1958, pleaded guilty in the Southern District of New York;* Mark Zborowski, who was indicted for perjury on April 18, 1958, as a result of his denial before the Federal Grand Jury that he knew Jack Soble; and Vassili Molev, an official attached to the Soviet Embassy, Washington, D.C., who was declared persona non grata, January 25, 1957." (App. 78-79) (Emphasis added).

The FBI report stated that the Sobles pleaded guilty to espionage charges and emphasized the important position that Jack Soble held in the Soviet Union's espionage network:

> "Soble supervised activities of Soviet agents both in the United States and Europe; assigned them to recruit U.S. Government employees stationed abroad, to obtain information concerning military equipment and supplies; and has claimed to have obtained information concerning the number of atomic bombs stockpiled in the United States and the rate of atomic bomb production as well as photographs of atomic 'bunkers' in which bombs were stored." (App. 79-80).

In another section entitled "Ilya Wolston," included as part of the "Jack Soble Case," the FBI report reiterated the information that Soble had provided to Morros regarding the Soviet agent known as "Slava" and stated that in January 1955 Soble identified Wolston as "Slava." It further revealed that Soble, when pleading guilty to espionage in April 1957, furnished the FBI with information identifying Wolston as a Soviet agent:

> "5. *Ilya Wolston*
>
> Wolston was born in Russia. He entered the United States on April 30, 1939. He was naturalized a United States citizen on May 18, 1943. In 1942-1946 he served in the U.S. Army, in 1943 attending the U.S. Army Intelligence School at Camp Ritchie.
>
> On several occasions beginning May 7, 1950, Jack Soble furnished Boris Morros with information concerning an individual he described as a U.S. Army Colonel in Germany who furnished him information under the code name 'Slava,' which was very valuable to the Soviets. It is noted that from October 1949, until July, 1951, Wolston was employed by the U.S. High Commissioner of Germany in Berlin. In January, 1955, Soble identified his nephew, Ilya Wolston as 'Slava.' In addition, Jack Soble, pleading guilty in April, 1957, furnished information identifying Wolston as a Soviet agent who provided him information for the Soviets on several occasions beginning when Wolston was in a military camp, about 1943. Soble said Wolston gave him information concerning his assignments and names of four persons at the camp whom he believed could be approached by the Soviets." (App. 82-83).

In addition, the FBI report stated that in 1951 information concerning Wolston's probable identification as a Soviet agent had been provided to the Department of State:

> "Information concerning the probable identification of Wolston as a Soviet agent was furnished to the Department of State in 1951, together with data developed concerning his black market activities in Germany. The Department of State, on the basis of these data, dismissed Wolston from his employment in Berlin." (App. 83).

As set forth above, the FBI report indicated that the FBI did not rely exclusively or even primarily on Soble in identifying Wolston as a Soviet agent. On page 24, the report categorically stated, without any reference to Soble, that an FBI investigation had resulted in the identification of Wolston as a Soviet agent (App. 79). Another section of the report stated that information concerning his probable identification as a Soviet agent had been furnished to the Department of State in 1951, three years before Soble first told Morros that Wolston was "Slava" and six years before Soble's eventual arrest.

In all, the FBI report listed ten persons (including Wolston) as involved in the "Jack Soble Case" and identified each as a Soviet agent. The FBI report further indicated that, aside from Wolston, eight of the remaining nine were indicted for espionage or perjury, and either pleaded guilty, were convicted, or became fugitives. The ninth, an attache to the Soviet delegation to the United Nations, was declared *persona non grata* and left the country. The report disclosed that the tenth, Wolston, had received a one-year suspended sentence and three-years probation for failure to appear before a federal grand jury in 1958. (App. 78-90).

C. Publication of *KBG: The Secret Work of Soviet Secret Agents*

In January 1974, Reader's Digest Press published *KGB*, which details the functions and activities of the Soviet Union's intelligence and espionage organization. The author of *KGB* is John Barron, a senior editor of Reader's Digest who has received numerous awards and honors for distinguished reporting. (App. 53). Barron devoted more than four years to researching and writing the book, drawing on the world-wide research facilities of the Reader's Digest organization. Another Reader's Digest professional assisted the author in researching *KGB* on a full-time basis during the four-year period in which the book was prepared.

In Chapter IX of the book, the author summarizes the history of Soviet espionage and the Soviet Union's systematic employment of intelligence agents to obtain scientific, industrial, and military secrets of other nations. On page 188, the book notes that "Even in 1962, when Khruschev offered assurances that the Soviet Union did not intend to spy on anyone, the evidence of worldwide Soviet espionage abounded in public records." (App. 27). Referring to disclosures by "royal commissions in Canada and Australia, and official investigations in Great Britain and the United States," the book then contains the following sentence and footnote concerning Wolston:

> "*Among Soviet agents identified in the United States were* Elizabeth T. Bentley, Edward Joseph Fitzgerald, William Ludwig Ullmann, William Walter Remington, Franklin Victor Reno, Judith Coplon, Harry Gold, David Greenglass, Julius and Ethel Rosenberg, Morton Sobell, William Perl, Alfred Dean Slack, Jack Soble, *Ilya Wolston*, Alfred and Martha Stern.*

* No claim is made that this list is complete. It consists of Soviet agents who were convicted of espionage or falsifying information or perjury and/or contempt charges following espionage indictments, or who fled to the Soviet bloc to avoid prosecution . . . ." (App. 27-28). (Emphasis added).

In addition, the following entry concerning Wolston appears in the index to *KGB:*

> "Wolston, Ilya, Soviet agent in U.S., 188." (CA App. 121).

In the "Chapter Notes," described in the author's preface as explaining the basis on which each chapter is written, the following source is listed for the chapter referring to Wolston:

> "Soviet agents in U.S.: *Exposé of Soviet Espionage (Prepared by the FBI)*, R SSIS 1960." (App. 29).

In the more than 460 pages of *KGB*, the sentences quoted above are the only references to Wolston.

D. Proceedings in District Court and Court of Appeals

In March 1975, Wolston filed this libel action against respondents, asserting that the statements about him in *KGB* damaged his reputation, embarrassed and humiliated him, and demanding damages for this claimed injury.[2]

On deposition and in his affidavit, Barron testified that in referring to Wolston in *KGB* as among those identified as Soviet agents, he relied on the FBI report,

[2] On deposition Wolston testified that his sole complaint against the respondents was based on the statement in *KGB* that he had been identified as a Soviet agent. (CA App. 258-259).

Although Wolston claimed injury from the publication of *KGB*, his complaint does not refer to lost income, and on deposition he acknowledged that he could not attribute any loss of actual income to statements made about him in the book. He also admitted that he had been unemployed for the six years preceding publication of *KGB* with the exception of occasional services for which he received "very negligible" compensation. (CA App. 206, 259-260).

which unequivocally identified Wolston as a Soviet intelligence agent. (App. 17-18, 54). He pointed out that the FBI report is cited in the Chapter Notes of *KGB* as a source document for the information about Soviet agents in the United States appearing in Chapter IX, where the reference to Wolston is contained. (App. 54). Barron further noted that, in writing about Soviet espionage activity in *KGB*, it was necessary to "refer people to matters that are a part of the public record" and that the incorporation of the FBI report's findings constituted "using matters that are part of the public record to illustrate a broader and, I think, more original theme," which pertained to disclosures of the more recent clandestine activities of the KGB. (App. 20-21).

Barron stated that he had read the characterization of Soble in Morros' 1959 book, but that he had relied instead on the Senate document or FBI report which, at page 24, categorically stated that an FBI investigation had resulted in the identification of Wolston as a Soviet agent, without any mention of Soble. (App. 23-24). Additionally, Barron noted that, on page 26, the FBI report stated that "[i]nformation concerning the probable identification of Wolston as a Soviet agent was furnished to the Department of State in 1951," which was six years before Soble was arrested. (App. 24). Barron believed that the FBI had "[o]bviously . . . processed the information" and that it was "clear the information did not emanate from Jack Soble." (App. 24).

Barron also knew that Soble, after his arrest and "ideological defection", had provided information to the government that "proved to be quite reliable in many cases," and that, as the FBI report stated, in 1957 Soble had supplied additional information identifying Wolston as a Soviet agent. (App. 25). Barron explained that

Morros' view of Soble's reputation for truthfulness did not give him concern because Soble had earned it while acting as a spy:

> "I think we are speaking about, in a sense, two different people here—the Jack Soble as a Soviet agent and still under Soviet discipline, who was a professional agent, dissembling by nature and not necessarily immorally in his scheme of ethics as an agent, and then the Jack Soble who for reasons of his own decided to tell what he knew to the United States Government." (App. 25).

Barron testified that, as a journalist, his very extensive dealings with the FBI over many years, covering numerous subjects, had shown that information imparted to him by the FBI was reliable. (App. 21). Moreover, Barron regarded the FBI report concerning Wolston as consistent with what was known from other sources. (App. 21-22). Any further verification of the FBI report regarding Wolston was deemed unnecessary "[b]ecause this was a considered formal statement by the FBI bearing the imprimatur and passive endorsement of a constituted committee of the Senate, responsible for internal security matters; and our experience has been that statements of the FBI issued under such circumstances are reliable and legally defensible .... If the statement was made formally in writing and disseminated by a committee of the Senate, we considered it reliable." (App. 21-22).

Barron also refuted Wolston's claim that the footnote on page 188 of *KGB*, in referring to Wolston as among those who had been convicted of "contempt charges following espionage indictments," wrongly implied that Wolston had been indicted for espionage. Barron explained that the footnote was not false and that the phrase "following espionage indictments" provided the

accurate historical context in which Wolston pleaded guilty to contempt. It did not state that Wolston was himself indicted for espionage. As Barron testified, "I believe and know that he [Wolston] fell in the category of someone who was convicted of contempt of court following espionage indictments, which raised matters about which he refused to testify."[3] It was further shown, as reflected in the FBI report on Soviet espionage, that Wolston's guilty plea did in fact occur following espionage indictments of others by the special federal grand jury. (App. 78-84).

The affidavits and depositions established that at no time prior to publication of *KGB* was Barron ever aware of any fact giving him reason to doubt the truth of any statement in the book. (App. 54). No evidence was adduced to suggest that the accuracy of the FBI report had been called into question at the time *KGB* was published, or that Barron had, or should have had, any reason to doubt the accuracy of the FBI's identification of Wolston as a Soviet agent. Barron testified under oath that he "was confident upon publication of *KGB* that the book as a whole and each and every statement in it were true, and ... was aware of no fact that tended to make ... [him] doubt the truth of the book or of any statement in it." (App. 54). No evidence was introduced which impeached or contradicted this sworn statement.

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[3] When questioned on deposition about the footnote, Barron replied:

> "A. I believe and know that he fell in the category of someone who was convicted of contempt of court following espionage indictments, which raised matters about which he refused to testify.
>
> Q. (by Mr. Dickstein): Following his espionage indictment?
>
> A. No. I didn't say his espionage indictment, but if I meant to say his or theirs, I would have said it." (CA App. 70).

Affidavit evidence further established that the respondent publishers believed that *KGB* was accurate in all respects and were not aware of any fact that tended to make them doubt the truth of the book. Bantam, Book-of-the-Month, and Macmillan also relied upon the reputation of Reader's Digest as a well-known and respectable publishing house. This reliance was shown to be in accord with the normal and recognized standards of the publishing industry. (CA App. 341-346).

On this record, the district court granted respondents' motion for summary judgment. 429 F. Supp. 167 (D.D.C. 1977). The court of appeals unanimously affirmed. 578 F.2d 427 (D.C. Cir. 1978). It held that under the standard of *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974) and *Time, Inc.* v. *Firestone*, 424 U.S. 448 (1976), Wolston was a public figure for the limited purpose of comment on his connection with, or involvement in, Soviet espionage in the 1940's and 1950's, which was the subject of the alleged falsehoods. (App. 107). The court therefore noted that, in order to recover, Wolston was required to demonstrate that the challenged statements were published with "actual malice," that is, with knowledge that they were false or with reckless disregard of whether they were false or not. (App. 114). Because the evidence raised no genuine issue with regard to the existence of actual malice on respondents' part, and because Wolston could not make the necessary showing in that regard in view of the uncontradicted evidence, the court of appeals concluded that summary judgment for respondents was required.

SUMMARY OF ARGUMENT

The First Amendment guarantees of freedom of speech and press, as this Court has recognized, embody our profound national commitment to the ideal of democratic

self-government. Public discussion of public issues is, therefore, the duty and right of each citizen and the essence of the Constitution's protection. To give that process the necessary "breathing space," this Court has held that the First Amendment grants to the publisher or citizen-critic the protection of the "actual malice" standard in cases where public officials or public figures seek to impose liability for defamatory falsehood concerning their conduct. That is the situation in the present case.

1. Petitioner became a public figure by voluntarily injecting himself into a public controversy over Soviet espionage in the 1940's and 1950's. His deliberate refusal to comply with the subpoena of the special federal grand jury investigating Soviet espionage resulted in his plea of guilty to the contempt-of-court charge and attracted significant public attention and comment. Criminal activity of this sort inevitably entails a breach of a person's right to privacy and a relinquishment of part of one's interest in protecting his own good name. It is conduct that invites, if not compels, public attention and comment, and the criminal transgressor thereby creates an enhanced risk of defamatory falsehood concerning his activities. Having assumed that risk and entered the public forum, and having placed his name and conduct on the public record, petitioner made himself a public figure as the necessary consequence of those actions.

Moreover, petitioner's criminal conduct occurred in the context of a major public controversy over the espionage activities of Soviet intelligence agents in the United States. This was a subject of profound national concern. The controversy further involved governmental action to protect the national security, in the form of an official investigation by the grand jury and the FBI, and petitioner's criminal resistance to, and his effect upon, that official inquiry. The comments regarding petitioner related to strictly public matters, not his private life or

affairs, and served to inform the public about matters of legitimate interest.

Petitioner's subjective motivation in becoming involved in the controversy is irrelevant. The important protections of the First Amendment cannot depend on the personal desires of a particular public figure, nor can the Constitution require the publisher to guess what those personal motives may be. Despite the self-serving excuses he now offers, petitioner's plea of guilty to the criminal contempt charge conclusively establishes the voluntariness of his conduct, and he is estopped from attempting to relitigate that issue in a different proceeding two decades later. Under the First Amendment, it suffices that petitioner's voluntary conduct was of the sort that invited attention and comment in the context of a public controversy.

2. Summary judgment was properly granted for respondents, because there was no evidence that the challenged statements were published with knowledge of their falsity or with reckless disregard of whether those statements were false or not. Undisputed evidence demonstrated that, in stating that petitioner had been identified as a Soviet agent, Barron relied upon the official FBI report as published by the Senate Subcommittee. The accuracy of that report had not been called into question, and petitioner presented no evidence raising any inference whatsoever of "actual malice." The lower courts, applying traditional summary judgment rules, correctly found that there was no genuine issue of material fact and granted judgment for respondents.

ARGUMENT

I

THE COURTS BELOW CORRECTLY HELD THAT PETITIONER IS A PUBLIC FIGURE FOR THE LIMITED RANGE OF ISSUES INVOLVED IN THIS CASE

A. Petitioner's Status As A Public Figure

In *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 278-280 (1964), this Court held that the First Amendment prohibits a public official from recovering damages for defamatory falsehood relating to his official conduct "unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." A contrary rule compelling the critic of official conduct to guarantee the truthfulness of all his assertions would be plainly inadequate, the Court explained, because it would inevitably lead to "self-censorship" and would deter would-be critics from voicing their criticisms. *Ibid.*

The "actual malice" standard was later held to be applicable to "public figures" as well as public officials in *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967). As Chief Justice Warren stated in his concurring opinion in that case, the "citizenry has a substantial interest in the conduct of [public figures], and freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of 'public officials'." *Id.*, at 162, 164. With a majority of the Justices acquiescing in the Chief Justice's opinion, the Court concluded that the plaintiff football coach, accused in a magazine of conspiring to "fix" a football game, qualified as a public figure and was therefore required to meet the "actual malice" standard. Later, in *Greenbelt Cooperative Publishing Ass'n.* v. *Bresler*, 398 U.S. 6, 9 (1970), the Court held that a local real estate developer,

involved in negotiations with the local city counsel over construction plans and land purchases, must be deemed a public figure "within even the most restrictive definition" of the term.

These principles were subsequently reaffirmed in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974). In explaining the rationale for the application of an "actual malice" standard in such cases, the Court observed that public figures "invite attention and comment" and that "the communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them." *Id.*, at 345. In contrast, a private individual has "relinquished no part of his interest in the protection of his own good name, and consequently he has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood." *Ibid.* The Court noted that an individual may become a public figure in either of two alternative ways:

> "In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues." *Id.*, at 351.

In the present case, the district court and the court of appeals unanimously held that Wolston was a public figure under the second category defined in *Gertz*. Both courts agreed that, by failing to respond to the subpoena requiring his appearance before the special federal grand jury investigating Soviet espionage, and by subjecting himself to a contempt citation and ultimately to a guilty plea to a criminal offense, Wolston "invite[d] attention and comment" and "inject[ed] himself . . . into a particular public controversy," as stated in *Gertz*. 418 U.S. at 345, 351.

Wolston's unlawful conduct qualified him as a "public figure for the limited purpose of comment on his connection with, or involvement in, espionage in the 40's and 1950's." (App. 122). We submit that the lower courts were plainly correct in determining that Wolston is public figure for this limited range of issues.

Wolston's acts occurred in the context of an ongoing public controversy over the espionage activities of Soviet intelligence agents in the United States. The FBI had been engaged in an intensive investigation of a Soviet espionage ring in New York City, resulting in the arrest and indictment of Wolston's uncle and aunt, Jack and Myra Soble, who pleaded guilty to espionage charges in April 1957. In the ensuing months, further indictments had been returned against others involved in these espionage matters, producing additional guilty pleas, convictions, and a diplomatic expulsion. (App. 78-84).

It is in this setting, then, that Wolston's effort to resist an appearance before the special federal grand jury must be viewed. It is undisputed that, on July 1, 1958, Wolston failed to obey a duly authorized grand jury subpoena requiring his appearance on that date, and on August 7, 1958, he entered a plea of guilty to a criminal-contempt charge. On August 13, he received a one-year suspended sentence on his guilty plea and was placed on conditional probation.

The events surrounding petitioner's criminal conduct, as the court of appeals pointed out, "immediately attracted a significant amount of public attention and coverage by the newspapers." (App. 121). Wolston's prior failures to appear before the grand jury and his relationship to the confessed Soviet spy Jack Soble were discussed in the press. Attention was also focused on the government attorney's statement that Wolston had been in frequent contact with Soble for some time before his arrest (App. 52) and that Wolston's testimony was sought

because he was believed to have information material to the espionage investigation. The show cause order, the contempt proceedings, and Wolston's guilty plea and sentence aroused considerable public interest and discussion in the news media.

The public comment and debate continued with the publication of Morros' book in 1959, which recounted Wolston's "failure to respond to six subpoenas issued by a Federal Grand Jury in New York" and his guilty plea to contempt. (App. 34). In 1960, the Subcommittee on Internal Security of the Senate Comittee on the Judiciary published the FBI report, which again called attention to the controversy over Soviet espionage and Wolston's contumacious failure to respond to the grand jury subpoena and resulting sentence. (App. 83).

In sum, by intentionally dishonoring a lawful subpoena requiring his testimony concerning espionage matters, Wolston "voluntarily inject[ed] himself . . . into a particular public controversy and thereby [became] a public figure for a limited range of issues." *Gertz* v. *Robert Welch, Inc.*, 418 U.S. at 351. His actions "invit[ed] attention and comment" and predictably aroused the public's interest. *Id.*, at 345. In these circumstances, Wolston's conduct undoubtedly gave rise to public-figure status. For where an individual engages in criminal activity, he inevitably breaches his own privacy and runs the risk of closer public scrutiny. He necessarily "relinquishe[s] . . . [a] part of his interest in the protection of his own good name, and consequently he has a . . . [less] compelling call on the courts for redress of injury inflicted by defamatory falsehood." *Ibid.* As the district court stated:

> "[A] contempt conviction for failure to appear before a grand jury investigating espionage invites press and public alike to ask the very questions which the alleged libel in this case purports to answer, namely: 'Why did he fail to appear? What was his connection with the investigation?' Refusal to extend the constitutional privilege to answers to those questions which the press believes to be true (or about which it has no serious doubts) would serve to muzzle, rather than to encourage, the debate which the First Amendment is designed to foster." (App. 108).
>
> "[I]n choosing not to appear before the grand jury, Wolston breached his privacy himself and thereby relinquished a measure of his interest in protecting his reputation . . . . In choosing not to comply, Wolston knew, or certainly should have known, that he would attract attention—again, precisely the sort of attention he challenges in this case. He cannot now be heard to complain that someone noticed him, unless he can prove actual malice. For answers to the questions raised by Wolston's conviction, whether right or wrong, fall within the ambit of the constitutional privilege." (App. 108-110).

This conclusion is particularly compelling where, as here, the criminal conduct was committed in connection with an ongoing controversy over a subject of vital public concern. The security of the nation, and the work of Soviet espionage agents threatening that security, undeniably constitute public issues as to which the debate must be "uninhibited, robust and wide-open." *New York Times Co.* v. *Sullivan*, 376 U.S. at 271. The precept underlying the First Amendment, that "speech concerning public affairs is . . . the essence of self-government," *Garrison* v. *Louisiana*, 379 U.S. 64, 74-75 (1964), applies with special force in this context. Discussion of these important matters can hardly be conducted without reference to the activities of individuals, such as Wolston, who have placed themselves in the public arena and become part of the

controversy. Public-figure status must therefore attach to Wolston "to assure to the freedoms of speech and press that 'breathing space' essential to their fruitful exercise." *Gertz* v. *Robert Welch, Inc.*, 418 U.S., at 342.

B. Conformity with *Time, Inc.* v. *Firestone* and *Gertz* v. *Robert Welch, Inc.*

This Court's decisions in *Time, Inc.* v. *Firestone, supra*, and *Gertz* v. *Robert Welch, Inc.* confirm the correctness of the judgment below. In *Firestone*, the Court held that Mrs. Firestone was not a public figure merely because of her involvement in divorce litigation. The Court reasoned that "[d]issolution of a marriage through judicial proceedings is not the sort of 'public controversy' referred to in *Gertz*, even though marital difficulties of extremely wealthy individuals may be of interest to some portion of the reading public." 424 U.S., at 454. Additionally, Mrs. Firestone had not *voluntarily* injected herself into any public issue but "was compelled to go to court by the State in order to obtain legal release from the bonds of matrimony." *Ibid.*

First, unlike *Firestone*, there can be no doubt that the present case does indeed involve a "public controversy" of the nature referred to in *Gertz*. Although not every matter disclosed to the public may be equated with a "public controversy," the events involved here touch upon a subject of highest national importance—the activities of Soviet espionage agents in the United States. It further concerns *governmental actions*—the investigation conducted by the FBI and the special federal grand jury into Soviet espionage—and Wolston's resistance to and effect upon that official inquiry, a resistance which ultimately took the form of criminal conduct defying the grand jury's subpoena. Comment on a citizen's public deeds, where they bear on governmental action and arguably affect or harm the interests of the general citizenry, must

certainly go to the core of the First Amendment's protection of free speech. *New York Times Co.* v. *Sullivan*, 376 U.S., at 267-279.

Added to this is the inherently public nature of a criminal contempt proceeding under the Sixth Amendment's requirement of a public trial. And as this Court recognized in *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 492 (1975), "[t]he commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions . . . are without question events of legitimate concern to the public . . . ." *See Nebraska Press Asso.* v. *Stuart*, 427 U.S. 539 (1976). Criminal contempt proceedings cannot be compared to the divorce litigation involved in *Firestone*, a domestic and customarily private matter.

Second, Wolston came into the public eye through a route dramatically different from Mrs. Firestone's. Wolston's actions, unlike those of Mrs. Firestone, did not consist solely of compulsory involvement in judicial proceedings in a wholly lawful and routine manner. Of course, the Court in *Firestone* recognized that "participants in some litigation may be legitimate 'public figures', either generally or for the limited purpose of that litigation." 424 U.S., at 457. This is not a case, however, where an individual is held to be a public figure "simply by virtue of . . . [his] being drawn into a courtroom" and compelled to reveal wholly private activities to which no legitimate public interest would otherwise attach. Rather, this case involves intentional criminal conduct in defiance of the legal process which occurred in the midst of a genuine public controversy. Unlike Mrs. Firestone's situation, the disclosure of Wolston's activities cannot be said to have come about through no fault of his own. He voluntarily chose to violate the requirements of the legal process by refusing to respond to a grand jury subpoena and thereby subjected himself to a contempt charge and a guilty plea. As the district court stated:

> "In no sense did the Government compel him to remain at home on July 1, 1958. He might instead have chosen to comply with the subpoena or like respondent Firestone, to go to court to vindicate whatever right he may have had not to comply with it. When he failed to choose either of these alternatives, he became involved in a controversy of a decidedly public nature in a way that invited attention and comment, and thereby created in the public an interest in knowing about his connection with espionage that outweighed his competing interest in remaining anonymous." (App. 110).

Unlike Mrs. Firestone, Wolston was not compelled by the government to embark on a course that inevitably required public disclosure of private activities. Instead, he freely chose to do so, and accordingly, he breached his own privacy and became part of a genuine public controversy.

Under traditional principles of privacy law, moreover, it has long been recognized that a person convicted of a crime—even a person accused of a crime—can no longer expect the anonymity from public scrutiny that private individuals enjoy. Restatement of Torts (Second) §452D, Comment f, p. 389.[4] *Cf. Cox Broadcasting Corp.* v. *Cohn, supra.* Wolston's activities in relation to the subject matter of Soviet espionage "have become part of the public domain" due to his own fault. *Klein* v. *McGraw Hill, Inc.*, 263 F. Supp. 919, 921 (D.D.C. 1966).

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[4] The Restatement provides:

> "Those who commit crime . . . are . . . persons of public interest, concerning whom the public is entitled to be informed. . . . These persons are regarded as properly subject to public interest. . . ."

Accord: Barbieri v. *News-Journal Co.*, 56 Del. 67, 189 A.2d 773 (1963); *Briscoe* v. *Reader's Digest*, No. LTC 71-2458 (C.D. Cal., July 18, 1972), 1 Med. L. Rptr. 1852. *See also* Hill, *Defamation And Privacy Under The First Amendment*, 76 Column. L. Rev. 1205, 1256 (1976).

These same considerations also separate him from the plaintiff in *Gertz* v. *Robert Welch, Inc., supra. Gertz* involved an attorney who had been retained by the family of the victim of a police shooting to represent them in civil litigation against the convicted policeman. The Court held that the attorney was not a public figure because he had achieved no general fame or notoriety in the community, had taken no part in the prior criminal prosecution of the policeman, had never discussed the criminal or civil trial with the press, and had participated in the civil case solely as the legal representative of his private client.

Put simply, the thrust of *Gertz* is that the customary representation of a private client in a lawsuit, absent more, should not constitute a relinquishment by an attorney of any part of his interest in protecting his own good name. The status of such a private attorney differs significantly from a person who engages in conduct contemptuous of the legal process in a context that places him, by his own actions, in the center of public controversy. Criminal conduct necessarily entails a relinquishment of part of one's interest in protecting his own good name.[5]

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[5] Lower courts have construed the principles of *Gertz* and *Firestone* to require a finding of public-figure status in circumstances far less compelling than these. In *Meeropol* v. *Nizer*, 381 F. Supp. 29 (S.D.N.Y. 1974), *aff'd in relevant part*, 560 F.2d 1061 (2nd Cir. 1977), *cert. denied* 434 U.S. 1013 (1977), for example, the Second Circuit held that the natural children of Julius and Ethel Rosenberg were public figures because of the controversy and publicity attending their parents' prosecution on espionage conspiracy charges. Even though the plaintiff children had later changed their names, the Court still concluded that "[i]n the course of the extensive public debate revolving about the Rosenberg trial, appellants [then nine and five years old respectively] were cast into the limelight and became 'public figures' under the *Gertz* standards." 560 F.2d at 1066.

In *Rosanova* v. *Playboy Enterprises, Inc.*, 580 F.2d 859 (5th Cir. 1978), the plaintiff was held to be a public figure as a result

(footnote continued)

C. Petitioner's Contentions

1. Wolston argues, however, that he cannot be held to be a public figure because his criminal disregard of the grand jury's subpoena "was not for the purpose of influencing the public views with regard to the espionage controversy . . . ." (Pet. Br. 20). He asserts that his actions were "in no way designed to draw attention to himself" or "to influence the public with respect to any issue" (Pet. Br. 18) and that his failure to respond to the subpoena was allegedly due partly to his "medical condition." (Pet. Br. 20).

Wolston's position, no matter how phrased, amounts to no more than a claim that he did not desire to become a public figure. Public-figure status, however, does not turn on the subjective intent or personal motivation of the individual involved. Under *Gertz*, it suffices that the public figure's actions were such as to have "invit[ed] attention and comment" in the context of a "public controversy". *Gertz* also recognized that public-figure status can arise either voluntarily or involuntarily, that is,

(footnote continued)
of his extensive and voluntary contacts with organized crime figures and others who were the subject of widespread publicity. This was so despite the fact that he had never been convicted of any crime. 411 F. Supp 440, 445 (S.D. Ga. 1976).

Other courts have similarly held that public-figure status may arise where an entity is made the subject of a proposed complaint by an administrative agency, *Trans World Accounts* v. *Associated Press*, 425 F. Supp. 814 (N.D. Cal. 1977); or where a person is the subject of an indictment for fraud, *Orr* v. *Argus-Press Co.*, 586 F.2d 1108 (6th Cir. 1978); or where a person is arrested on murder charges, *Donaldson* v. *Washington Post*, No. 2331-76 (D.C. Sup. Ct., November 22, 1977), 3 Med. L. Rptr. 1436 (1977).

Certainly Wolston, who entered a guilty plea to a criminal contempt charge in the context of a major espionage investigation, is a public figure as that term has generally been understood by lower courts.

if an individual either "voluntarily injects himself or is drawn into a particular controversy." 418 U.S., at 351.

There can be no doubt that Wolston's actions in avoiding the subpoena were bound to invite public attention and comment, and did so in fact, in the context of the public controversy over Soviet espionage. Whether Wolston subjectively desired publicity is beside the point.[6] Moreover, there is no need to consider Wolston's possibly *involuntary* public-figure status because his guilty plea made him a *voluntary* public figure. Despite his wholly self-serving claims that health problems should have excused his failure to comply with the subpoena, the judgment entered on his guilty plea was a determination of his voluntarily contumacious conduct. There is no ground to impeach that determination almost two decades later, or to allow Wolston to attempt, in effect, to withdraw his guilty plea. Indeed, the doctrine of collateral estoppel settles the matter, and Wolston is conclusively barred from now asserting the contrary. *Parklane Hosiery Co.*,

[6] As the Fifth Circuit stated in *Rosanova* v. *Playboy Enterprises, Inc.*, 580 F.2d 859 (1978), *Gertz* does not require that public figure intend to achieve public notice or recognition:

> ". . . the status of public figure *vel non* does not depend upon the desires of an individual . . . . Comment upon people and activities of legitimate public concern often illuminates that which yearns for shadow. It is no answer to the assertion that one is a public figure to say, truthfully, that one doesn't choose to be. It is sufficient, as the district court found, that 'Mr. Rosanova voluntarily engaged in a course that was bound to invite attention and comment.' " *Id.* at 861.

Inc. v. *Shore*, 99 S.Ct. 645 (1979); *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313 (1971).[7]

Wolston's subjective motivation is irrelevant for an additional reason. In *Gertz*, this Court made it clear that "the communications media are entitled to act on the assumption that . . . public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them." 418 U.S. at 345. As the district court noted below, the First Amendment and attendant concept of "breathing space" are "simply incompatible with a test that forces the media to comprehend a person's motives, or to refrain from commenting on his actions." (App. 109-110). The standard must be an objective one, since "the media has no way of ascertaining with certainty—much less of proving—the actual thought processes of a putative public figure but instead must rely on objective indicia of his intentions." (App. 109). Consequently the press are entitled to assume that an individual's ostensibly voluntary actions are in fact voluntary. Here, Wolston's own plea of guilty to the charge of contempt attested to the voluntariness of his actions.

2. Wolston also appears to believe that an individual can become a public figure only if his objective is avowedly "political." This contention is plainly at odds with *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967), where the Court held that football coach Butts was a public figure. In *Gertz*, the Court reaffirmed that the *Butts* decision was

[7] Even if the contempt charge were disregarded, Wolston could alternatively be considered to be an involuntary public figure because of his involvement in the grand jury's investigation and his identification as a Soviet agent in the FBI report. *See Trans World Accounts* v. *Associated Press*, 425 F. Supp. 814 (N.D. Cal. 1977) and cases cited in note 5, *supra*.

"correct." *See* 418 U.S. at 343. Political motivation, therefore, is not the touchstone for the determination whether an individual is a public figure, nor is it consistent with the purpose of the First Amendment to saddle the press with the burden of proving the personal desires or objectives of a public figure. Again, under *Gertz* and *Butts* it is enough that Wolston voluntarily injected himself into a public controversy in a manner that invited attention and comment. There are many ways in which an individual can mount a public rostrum, and Wolston's prior conduct speaks louder than his present disclaimers. He knew, or reasonably should have known, that his admittedly contemptuous conduct, in the context of an important public controversy over Soviet espionage, would make him part of the public debate over those issues.

3. Nor can the lapse of time between Wolston's contumacious conduct and the publication of *KGB* in 1974 alter Wolston's public-figure status. The public controversy over Soviet espionage in the 1940's and 1950's, and Wolston's involvement in that controversy, continue to be a legitimate topic of public debate today. In this connection, the district court correctly observed, and the court of appeals agreed, that "historical comment on the espionage-related activities of Wolston and others who became involved in the controversy during the 1950's requires just as much protection as did media coverage of the events as they occurred." (App. 110). "The Constitution," the court stated, "does not confine debate on public issues and the roles of people involved in them to discrete and brief periods of time." (App. 110-111).[8]

[8] Other courts have consistently supported this view. In *Meeropol* v. *Nizer*, 381 F. Supp. 29 (S.D.N.Y. 1974), *aff'd*, 560 F.2d 1061 (2d Civ. 1977), the court held that the children of Julius and Ethel Rosenberg were public figures for purposes of a book published almost two decades after their parents' execution in 1953.

(footnote continued)

This observation is particularly appropriate since Wolston's name, his involvement with the special federal grand jury investigating espionage, his citation for contempt-of-court, and his guilty plea, all remain part of the public record. The continuing official recordation of those facts demonstrates Wolston's past and present public-figure status. *See Cox Broadcasting Corp.* v. *Cohn*, *supra*. *See also Bernstein* v. *National Broadcasting Co.*, 129 F.Supp. 817, 828 (D.D.C. 1955).

The values protected by the First Amendment require this conclusion. Authors who chronicle the past in order to illuminate the present make an indispensable contribution to the public exchange of ideas and should not be required to sacrifice constitutional guarantees. A contrary rule would deprive historical commentary of the First Amendment protection thought essential in *New York Times Co.* v. *Sullivan*, *supra*. To be sure, the importance of ensuring a full and free flow of information to the public is no less when the author is an historian than when he is a reporter. Here, the operation of the KGB today cannot be understood without an appreciation of its activities in the past. Elucidation of that history, which was the purpose of the chapter of *KGB* now in question, requires the full measure of the First Amendment's protection if the public is to receive the information required for the public debate over this controversy.

(footnote continued)

The Fourth Circuit stated the same principle in *Time, Inc.* v. *Johnson*, 448 F.2d 378, 381 (1971):

> "[M]ere passage of time will not necessarily insulate from the application of *New York Times Co.* v. *Sullivan*, publications relating to the past public conduct of a then 'public figure.' No rule of repose exists to inhibit speech relating to the public career of a public figure as long as newsworthiness and public interest attach to events in such public career."

This is in accord with privacy law principles. Thus, in *Cohen* v. *Marx*, 94 Cal. App.2d 704, 211 P.2d 320, 321 (1950), the court stated with respect to the relinquishment of one's privacy:

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We submit, therefore, that the district court and court of appeals correctly concluded that Wolston is a public figure for purposes of comment on his involvement in the public controversy over Soviet espionage in the 1940's and 1950's.

II

SUMMARY JUDGMENT WAS PROPERLY GRANTED TO RESPONDENTS IN THIS CASE.

In challenging the holdings below that respondents were entitled to summary judgment, Wolston takes a wholly mistaken view of this Court's prior decisions construing the First Amendment's guarantee of free speech, and stubbornly refuses to recognize the undisputed nature of the facts established in the record.

As a "public figure" under *Gertz* v. *Robert Welch, Inc.*, *supra*, petitioner is required to prove "actual malice" in order to recover for defamatory falsehood. Under *New York Times Co.* v. *Sullivan*, 376 U.S. at 280, "actual malice" means that the allegedly libelous statement was published "with knowledge that it was false or with reckless disregard of whether it was false or not." "Actual malice," or reckless disregard, is not equivalent to negligence. *Garrison* v. *Louisiana*, 379 U.S. 64, 79 (1964). Instead, it focuses

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> "[The plaintiff] could not at his will and whim draw himself like a snail into his shell and hold others liable for commenting upon the acts which had taken place when he had voluntarily exposed himself to the public eye. As to such acts he had waived his right of privacy and he could not at some subsequent period rescind his waiver."

Accord: Briscoe v. *Reader's Digest Association, Inc.*, *supra; Sidis* v. *F-R. Pub. Corp.* 113 F.2d 806 (2nd Cir. 1940), *cert. denied* 311 U.S. 711 (1941); *Estill* v. *Hearst Publishing Co.*, 186 F.2d 1017, 1022 (7th Cir. 1951); *Barbieri* v. *News Journal Co.*, 189 A.2d 773, 775-776 (Del. 1963).

on the publisher's state of mind, that is, the "defendant's attitude . . . toward the truth or falsity of the material published." *Cantrell* v. *Forest City Publishing Co.*, 419 U.S. 245, 252 (1974). Thus, "reckless disregard" for the truth has been interpreted as a "mental element." *Monitor Patriot Co.* v. *Roy*, 401 U.S. 265, 276 (1971). It requires a showing of a "high degree of awareness of . . . probable falsity." *Garrison* v. *Louisiana*, 379 U.S. 64, 74 (1964).

In *St. Amant* v. *Thompson*, 390 U.S. 727, 731 (1968), the Court summarized its numerous prior decisions defining "actual malice" or "reckless disregard" under *New York Times:*

> [R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant *in fact entertained serious doubts as to the truth of his publication.* Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice." (Emphasis added).

The burden is strictly on the plaintiff to prove "actual malice." *St. Amant* v. *Thompson*, 390 U.S. at 730. That showing cannot be made by mere preponderance of the evidence, but must be demonstrated with the "convincing clarity which the constitutional standard demands." *New York Times Co.* v. *Sullivan*, 376 U.S., at 285-86. In sum, plaintiff must make his showing of actual malice with "clear and convincing proof." *Gertz* v. *Robert Welch, Inc.*, 418 U.S., at 342.

Applying the standards articulated in this Court's prior decisions, both the district court and the court of appeals concluded that there was no genuine issue of fact as to the question of "actual malice" and that summary judgment must be entered for respondents. Reviewing

the entire record, the district court found that petitioner would be unable "to demonstrate clearly and convincingly that Barron or any of his co-defendants entertained serious doubts, or for that matter, any doubts about the truth of the statements in *KGB* that connect Wolston with espionage." (App. 114). The court of appeals likewise agreed that "the evidence raised no genuine issue with respect to the existence of actual malice on his part." (App. 130). Both courts were manifestly correct.

1. With regard to the statement in *KGB* that petitioner was "[a]mong [the] Soviet agents identified in the United States" as a result of official investigations, Wolston now claims there was genuine issue as to "actual malice" because Barron knew that Morros had characterized Soble as a "confirmed liar." In Wolston's view, Soble, an admitted spy, was therefore an unreliable source, even though Morros had not stated that he disbelieved Soble's identification of Wolston as "Slava." Wolston also claims that reckless disregard is shown by Barron's failure to make inquiries of federal agencies or to conduct a more extensive investigation.

The determinative question is whether respondents published the challenged statements with knowledge of their falsity or with reckless disregard of whether the statements were false or not. On that point, Barron testified under oath that he "was confident upon publication of *KGB* that the book as a whole and each and every statement in it were true, and I was aware of no fact that tended to make me doubt the truth of the book or of any statement in it." (App. 54). The record is utterly devoid of evidence that would in any way tend to impeach Barron's sworn statement or show that Barron must have in fact entertained serious doubts as to the truthfulness of the statement about Wolston. Accordingly, there is simply no genuine issue of material fact for a jury to consider.

In referring to Wolston in *KGB* as having been identified as a Soviet agent, it is undisputed that Barron relied on the FBI report, which categorically states that an FBI investigation resulted in the identification of Wolston as a Soviet agent. On page 24, the report sets forth this conclusion *without any reference to Soble as a source:* "In addition, the FBI investigation resulted in identifying as Soviet intelligence agents . . . Ilya Wolston . . . ." (App. 78-79).

On page 26, the FBI report further states that "[i]nformation concerning the probable indentification of Wolston as a Soviet agent was furnished to the Department of State in 1951 ...." (App. 83). The report adds, however, that it was not until January 1955, four years later, that Soble "identified his nephew, Ilya Wolston as 'Slava,' " the Soviet spy, and in his book Morros states that it was not until the fall of 1954 that Soble first disclosed Wolston's identification as "Slava." As the court of appeals concluded, "the plain intendment of the F.B.I. report, taken as a whole, is that the Bureau's investigation identified Wolston as a Soviet agent, without reference to Soble." (App. 128).[9]

Moreover, Morros' characterization of Soble did not give Barron concern because he knew that Soble had

[9] It was certainly reasonable to believe, as the FBI report itself says, that the FBI's own investigation had resulted in the identification of Wolston as a Soviet agent. Under *Time, Inc.* v. *Pape*, 401 U.S. 279 (1971), a rational interpretation of a public document is sufficient defense *as a matter of law* to a suit for defamation where the "actual malice" standard of *New York Times* applies. In *Pape*, the Court held that a newspaper's choice of one of several possible interpretations of an ambiguous government document is not enough to create a jury issue of "actual malice." Here, at least one interpretation of the FBI report (indeed, we submit, the only interpretation) is that the FBI identified Wolston as a Soviet agent without reliance merely, or even primarily, on Soble.

earned it while acting as a spy, and that after his arrest and "ideological defection," Soble had "decided to tell what he knew to the United States Government." (App. 25). Barron also knew that the information Soble then provided "proved to be quite reliable in many cases." (App. 25). The FBI report states that, after his guilty plea, Soble "furnished information identifying Wolston as a Soviet agent..." (App. 82). The plain inference of the FBI report is that the FBI then considered Sobel to be a credible witness, as the court of appeals observed. (App. 182). It was clearly reasonable for Barron to defer to the expertise of the FBI regarding Soble's veracity. The Bureau was in the best position to judge Soble's credibility in view of its own interrogations of Soble and its superior investigative resources and access to counter-intelligence information.

That Barron did not conduct a further investigation to determine whether Wolston was a Soviet agent does not create a jury question as to actual malice. This Court has repeatedly held that the failure of a publisher to investigate is insufficient to establish reckless disregard under *New York Times* and its progeny. "[M]ere proof of failure to investigate, without more, cannot establish reckless disregard for the truth." *Gertz* v. *Robert Welch, Inc.*, 418 U.S., at 332. In *New York Times* itself, the errors in the published advertisement could have been discovered and corrected if the newspaper had checked news stories in its own files. Nevertheless, the Court held that the failure of the newspaper to do so did not amount to reckless disregard, explaining: "The mere presence of the stories in the files does not, of course, establish that the Times 'knew' the advertisement was false ...." 376 U.S., at 287-88.

Subsequent cases have made clear that there is no duty to investigate before publishing and that the failure to do so does not create a jury question. In *Beckley*

Newspapers v. *Hanks*, 389 U.S. 81 (1967), the defendant newspaper stated in an editorial that plaintiff Hanks had made threats to a Mrs. Hurt in a telephone conversation. The newspaper had interviewed neither Hanks nor Hurt, and at trial its president could say only that the paper felt the threats were a "possibility." In a *per curiam* opinion, the Court reversed a verdict for the plaintiff and held: "it cannot be said on this record that any failure of petitioner to make a prior investigation constituted proof sufficient to present a jury question whether the statements were published with reckless disregard of whether they were false or not." 389 U.S., at 84-85.

The same principle was applied in *St. Amant* v. *Thompson*, *supra*, where the publisher made a public attack on the plaintiff solely on the basis of an affidavit from one Albin. The publisher had no personal knowledge of plaintiff's activities, and had made no effort to verify Albin's statements with individuals in a position to know. The record was silent as to Albin's reputation for veracity. The Court held, however, that the question was not whether a reasonably prudent man "would have investigated before publishing," but whether the defendant "in fact entertained serious doubts as to the truth of his publication." 390 U.S., at 731.

If the failure to investigate did not establish a jury question as to actual malice in any of these cases, it is difficult to perceive how such a question could be present here, where reliance was placed on an official report of the FBI which disclosed the results of its own investigation into the matter. The Federal Bureau of Investigation is, after all, the federal agency responsible for investigating Soviet espionage agents in the United States, and the expertise and resources available to it in accomplishing that task are far greater than those available to Barron. The FBI report had, moreover, been formally transmitted by direction of the Attorney General to the Subcommittee

of the Senate Judiciary Committee which was responsible for internal security issues, and that subcommittee published it as a Senate document summarizing "known Soviet espionage cases in the United States." (App. 56). Since this was "a considered formal statement by the FBI bearing the imprimatur and passive endorsement of a constituted committee of the Senate," Barron believed that he could rely on the FBI report. (App. 21).

The FBI report also "bore upon its face intrinsic proof of its reliability," as the court of appeals observed. (App. 129). The FBI report stated that the Bureau's investigation of the Jack Soble case resulted in the identification of ten individuals as Soviet intelligence agents. The report indicates that seven of those persons were indicted for espionage and later entered guilty pleas, were convicted, or became fugitives. The eighth was indicted for perjury and was convicted. The ninth was declared *persona non grata* and left the country. The tenth was Wolston. (App. 78-84).

Finally, despite the fact that Barron and his staff devoted over four years to researching and writing *KGB*, not a shred of evidence emerged suggesting that Wolston had ever objected to his identification as a Soviet agent in the FBI report or the Morros book.[10] All the evidence

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[10] Wolston admitted that although he had been aware of the Morros book for six of seven years prior to his deposition in 1975, he had taken no action whatsoever, neither filing a libel suit nor writing to the publisher of the Morros book to complain. (App. 39, CA App. 230).

There was also no evidence that a further investigation by Barron could have uncovered facts disproving the FBI's identification of Wolston as a Soviet agent. Any inconsistency between Wolston's military rank and Soble's 1954 description of "Slava" as an Army colonel, as related in the Morros book, was presumably considered by the FBI when it issued its 1960 report. Moreover, Soble's description of Slava in the Morros book bears

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confirmed Barron's sworn statement was that "[a]t no time have I been aware of any fact that would give me reason to doubt the truth of the FBI Report or any statement in it." (App. 54). That statement was completely uncontradicted.

Barron, therefore, properly relied upon a conclusion clearly set forth in a formal publication of the chief government agency which had jurisdiction over the subject matter at issue, in circumstances where there was no evidence that the accuracy of the official report had been challenged, and where the government document bore abundant indicia of reliability. There is absolutely nothing to impeach Barron's sworn statement that he believed his publication to be true and that he was unaware of any fact that would give him reason to doubt the accuracy of his publication. It would be anomalous to hold that a factual question of "actual malice" is created for the jury in view of Wolston's failure to present evidence raising any inference in that regard. The record simply could not support a verdict for petitioner that would be consistent with the First Amendment. Plainly, both lower courts were correct in granting summary judgment in respondents' favor.

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some remarkably interesting similarities to Wolston. Soble said that Slava had rendered services to the Soviets in Alaska, and evidently in San Francisco in connection with the formation of the United Nations, as well as in Germany. Wolston had been in all three places during approximately the same period. *Compare* App. 82, CA App. 168-180 with App. 30-34.

The FBI also presumably knew the true reasons for Wolston's termination by the Department of State, even if Wolston now asserts he was then told that it was only a reduction in force.

2. Wolston also complains that the footnote on page 188 of *KGB* states falsely that he was indicted for espionage.[11] Barron testified under oath, however, that the footnote's phrase "following espionage indictments" merely provides the accurate historical context in which Wolston pleaded guilty to contempt. The footnote does not state that Wolston was himself indicted for espionage. As Barron explained, "I believe and know that he [Wolston] fell in the category of someone who was convicted of contempt of court following espionage indictments, which raised matters about which he refused to testify." (CA App. 70). The FBI report further shows that Wolston did in fact enter his guilty plea following the indictment of others, including Wolston's own aunt and uncle, for espionage. (App. 78-84). Although the courts below suggested that the footnote might have been imprecisely or ambiguously phrased, both agreed that there was nothing in the record to suggest that Barron "in fact entertained serious doubts as to the truth of his publication." *St. Amant* v. *Thompson*, 390 U.S. at 731. As the court of appeals aptly observed, "Imprecision and ambiguity of expressions are ills that sometimes afflict even careful and well-intentioned writers, including lawyers and judges." (App. 129-130). There was no basis, therefore, for concluding that petitioner would be able to show actual malice "with convincing clarity which the constitutional standard demands." *New York Times Co.* v. *Sullivan*, 376 U.S. at 285-86.

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[11] That footnote, referring to a list of persons (including Wolston) named in the text as "[a]mong Soviet agents identified in the United States," reads as follows:

> "*No claim is made that this list is complete. It consists of Soviet agents who were convicted of espionage or falsifying information or perjury and/or contempt charges following espionage indictments, or who fled to the Soviet bloc to avoid prosecution. . . ."

3. Wolston asserts, however, that the Court of Appeals for the District of Columbia Circuit has developed a "special rule" for determining whether summary judgment should be granted in defamation cases where the standard of liability is governed by *New York Times Co.* v. *Sullivan* and that this "special rule" involves the court deciding issues of credibility of witnesses and drawing its own inferences from the evidence. (Pet. Br. 25). He further purports to find this "special rule" articulated exclusively in a concurring opinion to the District of Columbia Circuit's decision in *Wasserman* v. *Time, Inc.*, 424 F.2d 920, *cert. denied*, 398 U.S. 940 (1970), and asserts that it differs from the traditional summary judgment standard applied by the Ninth Circuit in *Guam Federation of Teachers, Local 1581, AFT* v. *Ysreal*, 424 F.2d 438, *cert. denied*, 419 U.S. 872 (1974).

There is no conflict between the District of Columbia Circuit and the Ninth Circuit regarding the applicable summary judgment standards. Although not revealed in his brief, the opinion in *Wasserman* upon which Wolston relies in his argument, and which the Ninth Circuit discusses in *Ysreal*, is a concurring opinion. Moreover, the views expressed by its author were purely *obiter dicta*. The Ninth Circuit explicitly recognized this fact in *Ysreal*, noting that "[w]hat [the concurring judge] said was not necessary to the decision, because in *Wasserman* the court reversed a summary judgment for the defendant and remanded 'for trial on the issues of actual malice, defamation and possible damages.'" 492 F.2d at 440.

Furthermore, the court of appeals in the instant case neither cited nor relied upon the views expressed by the concurring opinion in *Wasserman*, even assuming those views could be taken as favoring some special standard. The author of the concurring opinion in *Wasserman* was not a member of the court of appeals' panel in this case.

Nor is there the slightest indication that the District of Columbia Circuit follows any "special rule" for summary judgment in defamation cases, much less the "special rule" plaintiff strives to find in a concurring opinion in one case decided nine years ago. It is instructive that in *Ysreal* the Ninth Circuit observed (492 F.2d at 443) that its own views were in fact consistent with the summary judgment standard actually followed by the Distrcit of Columbia Circuit, citing *Washington Post Co.* v. *Keogh*, 365 F.2d 965 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1011 (1967), and that in *Keogh* there was "*no hint that the court of appeals was making its own judgment as to credibility.*" 492 F.2d at 443 (emphasis added). It is readily apparent that Wolston is merely engineering the construction of his own "straw man."

Finally, as their opinions reflect, both the courts below straightforwardly applied the traditional summary judgment principles, and viewing all the evidence in the light most favorable to Wolston, still concluded that there was no genuine factual issue as to the existence of "actual malice." This is simply not a case where there were any conflicting inferences to be drawn on evidence that went to any genuine issue, since the evidence on "actual malice" was uncontradicted.

What Wolston fails to appreciate is that summary judgment is required because of the demanding Constitutional standard to be applied on the question of liability. In the entire record there is not the slightest indication that Barron published the statements in question with a "high degree of awareness of ... probable falsity." *Gertz* v. *Robert Welch, Inc.*, 418 U.S. at 332. The mere allegation of a plaintiff, devoid of record evidence, can hardly present a jury question as to whether the publisher acted with reckless disregard of the truth. *St. Amant* v. *Thompson*, 390 U.S. at 731. Accordingly, we submit that both courts below were correct in holding that respondents were entitled to summary judgment.

CONCLUSION

For the reasons stated, we respectfully submit that the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

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Petitioner,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

ARGUMENT

I.

A. To give "breathing space" to protected speech, this Court has accorded substantial constitutional protection to defamatory falsehood in all cases, thus ensuring that the media will not be insurers of the truth of that which they communicate. The only consequence of a determination that petitioner is not a "public figure" for purposes of this defamation action would be that he may receive actual damages without showing that respondents' defamatory falsehoods were uttered knowingly or in reckless disregard of their untruth. For this Court has totally rejected liability without fault in defamation cases and permits punitive damages only on a showing of "actual malice" as that term is defined in New York Times Co. v. Sullivan, 376 U.S. 254, 279-280 (1964). (Gertz v. Robert Welch, Inc., 418 U.S. 323, 347, 349-350 (1974)).[1/] Respondents' assertion that reversal of the judgment below would adversely affect the exercise of First Amendment rights totally ignores these significant constitutional safeguards which they will enjoy whatever the outcome on the "public figure" issue. And respondents also ignore -- as if it were a light thing for a person to be accused of being a Soviet agent -- the petitioner's interest in his own reputation, and the societal interest in protecting it. Gertz makes clear that the extent of the protection which freedom of the press is to be given requires accommodation of "[t]he legitimate state interest * * * [in] compensation of individuals for the harm inflicted on them by defamatory falsehood" which injures "'private personality.'" Id. at 341. Respondents do not acknowledge that countervailing interest, nor do they recognize the limited intrusion on their interest in publishing which reversal would entail. They thus fail to do business with the actual issue before the Court.

B. We agree with respondents that "where an individual engages in criminal activity, he inevitably breaches his own privacy * * *" (Resp. Br. 24).[2/] However, while the public's

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1/ Contrast the present constitutional doctrine with the Alabama common law which was described id. at 267 and the Louisiana Criminal Defamation Statute struck down in Garrison v. State of Louisiana, 379 U.S. 64, described id. at 65 n.1, 78-79 (1964).

2/ Respondents' Brief will be cited as "Resp. Br." Petitioner's Brief will be cited as "Pet. Br."

justifiable interest in these matters may cause a person to lose his right of privacy with respect to reporting of the defendant's conduct, the state's accusation and its disposition, see Cox Broadcasting Corporation v. Cohn, 420 U.S. 469 (1975), he does not thereby become a public figure for libel purposes whose interest in protection from defamatory falsehood is diminished. Respondents' contrary argument proceeds from the unexpressed and erroneous premise that a public figure for purposes of privacy law is a public figure for purposes of defamation law.[3/] As this Court has recognized, however,

> "The tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has, and should have precisely the same scope in all of them runs all through legal discussions. It has all the tenacity of original sin and must constantly be guarded against." Civil Aeronautics Board v. Delta Air Lines, Inc., 367 U.S. 316, 328 (1961), quoting Cook, The Logical and Legal Bases of the Conflict of Laws at 159.

The interests protected by privacy and defamation law are different. Privacy law protects the right to be free from unwanted exposure to public view. Defamation law protects the right to be free from public exposure by false matter.

Adoption of a rule that a person who becomes involved in the criminal process[4/] and hence loses his right of privacy, is also thereby subject to the actual malice standard for defamation

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3/ Restatement of Torts (Second), § 652D, Comment f, relied upon by respondents, addresses who is a public figure for purposes of an action for invasion of privacy, not defamation.

4/ Respondents would categorize even persons who are only accused of crimes as public figures for libel purposes without regard to whether they are indicted and tried, and if tried, whether they are acquitted or convicted (Resp. Br. 28).

purposes ignores the state's interest in protecting such a person's reputation from defamatory falsehood. Such a person is not only particularly vulnerable to defamatory falsehood, he has no "access to the channels of effective communication and hence [no] * * * realistic opportunity to counteract false statements * * *." Gertz, 418 U.S. at 344. Even if convicted, he should not then be deemed to be a public figure, for the sanctions imposed by the state should be deemed sufficient; there is no room for the additional sanction that he thereby becomes fairer game for libel than the ordinary citizen. Otherwise the state's interest in rehabilitation would also be undermined.[5/]

Equation of the circumstances which cause loss of the right of privacy with the circumstances which make one a public figure for libel purposes is also inconsistent with this Court's opinion in Gertz. Involvement in that which is of general public interest may cause loss of privacy, but it cannot also result in diminution of one's right not to be defamed unless this Court adopts the plurality view in Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971),[6/] which Gertz expressly rejected.

5/ A convicted criminal's interest in being free from unwanted publicity which causes him embarrassment and the state's interest in his rehabilitation may be outweighed by the public's interest in information about matters of general concern where the communication is accurate. See Cox, supra. The same cannot be said where defamatory falsehood is involved. See Gertz, 418 U.S. at 340.

6/ Rosenbloom itself shows the distinction between the loss of a right of privacy and the loss of the right to be treated as a private person for purposes of defamation. Rosenbloom, a distributor of nudist magazines who was arrested and prosecuted on obscenity charges, did not seek publicity or consent to it. As the District Court recognized, he "was isolated from public view until others had thrust him into it." Rosenbloom v. Metromedia, Inc., 289 F. Supp. 737, 742 (E.D. Pa. 1968). It was the action of the government which drew attention to him. Accordingly, (footnote continued)

Ilya Wolston's failure to respond to the grand jury subpoena, accordingly, without doubt resulted in loss of his right of privacy with respect to the reporting of that event and his criminal prosecution, but it did not make him a public figure for libel purposes. 7/ Nor does his criminal conviction for failing to obey the subpoena mean that the state's interest in protecting his reputation with respect to accusation of the crime of espionage is diminished, especially where, as here, he has no realistic opportunity to counteract the libel, and the crime which KGB says he committed is particularly heinous. 8/

(footnote continued) although he may have lost his right to privacy with respect to the government's charges, see Cox, supra, the District Court held that he was a private person for libel purposes. This Court accepted this characterization of him both in the plurality opinion and in the dissents, despite the fact that a finding that he was a public figure under Curtis Publishing Co. v. Butts and Associated Press v. Walker, 388 U.S. 130 (1967) would have avoided decision on a constitutional issue which fragmented the Court.

7/ Nor did subsequent defamatory falsehoods, such as those which appeared in the Morros book and FBI report, change his status. As the District Court recognized,

> In assessing Wolston's "notoriety," this court limits itself to consideration of his contempt conviction and subsequent coverage of that conviction. For if, as Wolston contends, allegations that he was a Soviet agent are libelous, then any notoriety springing from those allegations has no bearing on the issue here. The Supreme Court's decisions require purposeful activity on plaintiff's part; thus libel alone -- particularly the very libel on which a lawsuit is based -- cannot rob a person of his status as a private individual. (App. 103 (District Court Opinion)).

The Court of Appeals similarly restricted itself to consideration of Wolston's failure to appear, contempt conviction and contemporaneous news coverage. (See App. at 121-123).

8/ Respondents attribute to petitioner the proposition that a person who was once a public figure will lose that status over time (Resp. Br. 33-34). We have not urged the proposition here. Rather, we believe that under application of any fault standard, the length of time between the event and the publication is a (footnote continued)

II.

A. We fully agree with respondents that the New York Times "actual malice" test "focuses on the publisher's state of mind * * *" (Resp. Br. 35-36). And that is one of two reasons why Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464 (1962) establishes that the courts below erred in allowing summary judgment. (See the second sentence of the quotation from Poller (id. at 473) at Pet. Br. 23 and our comment at the top of Pet. Br. 24).

The second reason that Poller is decisive against respondents is its holding that it is "only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised." (368 U.S. at 473, third sentence quoted at Pet. Br. 23). That acceptance of Barron's credibility was critical to the resolution of the "actual malice" issue is underscored by respondents' pervasive reliance on what Barron "testified under oath" (Resp. Br. 37, 43. See also Resp. Br. 38-39, 41, 42 referring to various assertions in Barron's deposition and affidavit). Despite respondents' repeated suggestions that it was incumbent on petitioner to adduce evidence which would impeach Barron (Resp. Br. 37, 41, 42), Poller placed no such burden on the party which opposes summary judgment. And St. Amant v. Thompson, 390 U.S. 727 (1968), heavily relied on by respondents (Resp. Br. 36, 40, 43, 45), held:

(footnote continued) matter to be considered by the trier of fact in determining whether there was fault because it bears on the opportunity afforded for investigation. Obviously, such considerations would allow for differences in result between media reporting of "hot news" and the process of writing what purport to be reflective works of history.

> The defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. (390 U.S. at 732). 9/

A fortiori the defendant cannot thereby automatically avoid a trial on motion for summary judgment.

To grant such a motion where a material issue turns on a credibility determination is wrong for two reasons: first, it deprives the trier of fact -- whoever it may be -- of the advantage of observing the demeanor of witnesses whose credibility is at issue; and second, it deprives the plaintiff of his Seventh Amendment right to have any fairly disputable material issue of fact resolved by a jury rather than a judge. 10/

B. It is enough to require reversal that the decision below conflicts with the summary judgment precedents in this Court (Pet. Br. 23-24), which able and resourceful counsel for respondents fail even to mention. We shall therefore respond only briefly to their strained denial that the District of Columbia Circuit has developed a special summary judgment rule for

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9/ In the passage from St. Amant quoted at Resp. Br. 36, this Court reiterated the substantive standard of liability under New York Times, and the opinion elsewhere places the burden of proving "actual malice" on the plaintiff (390 U.S. at 730); but this does not affect the propriety of summary judgment. In Poller itself it was, of course, the plaintiff (there as here the party which opposed summary judgment) that had the burden of proof with respect to the existence of a conspiracy in restraint of trade.

10/ Of course, the foregoing does not mean that summary judgment will never be available to defendants in defamation cases. Most issues in a defamation suit involve no mental element, and in many, the motion will not depend on accepting the credibility of a defense witness. For example, it can ordinarily be determined as a matter of law whether a defamatory statement is an assertion of fact, or is immune because it is an expression of opinion or rhetorical hyperbole. See Greenbelt Cooperative Publishing Ass'n. v. Bresler, 398 U.S. 6, 14 (1970).

New York Times "malice" cases. It suffices to point out that the District Judges in the District of Columbia believe that there is a special rule; indeed, the District Court began its discussion of the application of the constitutional standard with the observation that "[t]he court of appeals for this jurisdiction has observed that summary procedures are especially appropriate in the First Amendment area" (App. 113), citing Washington Post Company v. Keogh, 365 F.2d 965, 968 (D.C. Cir. 1966), cert. denied, 385 U.S. 1011 (1967). 11/ In any event, respondents do not disagree that "the traditional summary judgment standard [was] applied by the Ninth Circuit in Guam Federation of Teachers, Local 1581, AFT v. Ysrael, 424 F.2d 438, cert. denied, 419 U.S. 872 (1974)" (Resp. Br. 44). Respondents appear to be satisfied with that standard, and so are we.

CONCLUSION

For the foregoing reasons, and those stated in the Brief for Petitioner, the judgment of the court below should be reversed and the case remanded for a trial on the merits.

11/ See also Martin Marietta Corp. v. The Evening Star Newspaper Co., 417 F. Supp. 947, 954 (D.D.C. 1976, Flannery, J.); Hoffman v. The Washington Post Co., 433 F. Supp. 600, 604-605 (D.D.C. 1977, Pratt, J.), aff'd without opinion, 578 F.2d 442 (D.C.Cir. 1978). Since respondents make much of the fact that Judge Wright's opinion in Wasserman v. Time, Inc., 424 F.2d 920 (D.C.Cir.), cert. denied, 398 U.S. 940 (1970)(discussion in Pet. Br. at 25-29) was only a concurring opinion (Resp. Br. 44-45), we note that it represented the views of the majority of the panel, since it was joined by a second judge, and that it was regarded as stating the rule of the District of Columbia Circuit by both the Fifth and the Ninth Circuits in the cases cited at Pet. Br. 26, text and note 7. And since that opinion was written by the author of Washington Post v. Keogh and cites that decision as authority for the proposition stated, it reflects what the Keogh opinion means, or at the very least represents an authoritative gloss thereon.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this date two copies of the foregoing Reply Brief for Petitioner were served by hand upon John J. Buckley, Jr., Williams & Connolly, 839 - 17th Street, N.W., Washington, D.C. 20006, counsel of record for respondents.

Dated: April 10, 1979

George Kaufmann

George Kaufmann

FOR ARGUMENT

Supreme Court, U. S.
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MAR 26 1979
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IN THE

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OCTOBER TERM, 1978

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Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE AMERICAN SOCIETY OF NEWSPAPER EDITORS AND THE NATIONAL NEWSPAPER ASSOCIATION, *AMICI CURIAE*, IN SUPPORT OF AFFIRMANCE

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BRIEF OF THE AMERICAN SOCIETY OF NEWSPAPER EDITORS AND THE NATIONAL NEWSPAPER ASSOCIATION, *AMICI CURIAE*, IN SUPPORT OF AFFIRMANCE

INTRODUCTION AND INTEREST OF THE *AMICI*

The American Society of Newspaper Editors and the National Newspaper Association, whose interests are set forth below with particularity, hereby submit this joint brief as *amici curiae* in support of affirmance of the decision of the United States Court of Appeals for the

District of Columbia Circuit (578 F.2d 427 (1978)). Letters of consent to the filing of this brief from counsel for all parties have been filed with the Clerk of this Court.

The American Society of Newspaper Editors is a nationwide, professional organization of more than 800 persons who hold positions as directing editors of daily newspapers throughout the United States. The purposes of the Society, which was founded over fifty years ago, include the maintenance of "the dignity and rights of the profession" (ASNE Constitution, Preamble) and the ongoing responsibility to improve the manner in which the journalism profession carries out its responsibilities in providing an unfettered and effective press in the service of the American people.

The National Newspaper Association is a national trade association of 5500 daily and weekly newspapers with members in all fifty states. One of the Association's major purposes is to preserve the constitutional guarantee of freedom of the press for community newspapers.

Amici submit that the protection afforded journalists by this Court's "public figure" doctrine is essential to preventing the diminution of the role of the press as an effective force in informing the public about their society and government. The proliferation of libel actions against newspapers during the last two decades threatens to cast the pall of self-censorship over the entire journalism fraternity, resulting in a decreased flow of information to the public and undermining the goal of "uninhibited, robust, and wide-open" debate on public issues, *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964), repeatedly articulated by this Court. Consequently, *amici* urge this Court to preserve the protections afforded by the First Amendment to discuss the significant people and events of

the day without fear of reprisal except for false statements published with subjective actual malice, by affirming the decision of the court below.

ARGUMENT

I. TO AVOID THE PERNICIOUS EFFECTS OF SELF-CENSORSHIP, THE FIRST AMENDMENT REQUIRES PUBLIC FIGURES TO PROVE "ACTUAL MALICE" FOR RECOVERY IN A LIBEL ACTION

Lying at the very core of the values protected by the First Amendment is the notion that debate on significant public issues and government affairs should be "uninhibited, robust, and wide-open." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964); *see Mills* v. *Alabama*, 384 U.S. 214, 218-19 (1966); *Thornhill* v. *Alabama*, 310 U.S. 88, 101-02 (1940). *See generally* A. Meiklejohn, *Political Freedom: The Constitutional Powers of the People* (1965). As Justice Brandeis noted, those who won our independence believed that "public discussion is a political duty; and this should be a fundamental principle of American government." *Whitney* v. *California*, 274 U.S. 357, 375 (1927) (concurring opinion). Recognizing that the right to criticize the activities of the government is inseparable from the right to criticize the actions of public officials, this Court in *Sullivan* imposed the stringent standard of "actual malice" on public officials who sought to recover in libel for defamatory false statements directed against them.

This Court subsequently extended the "actual malice" standard to include public figures in *Curtis Publishing Co.* v. *Butts* and its companion case, *Associated Press* v. *Walker*, 388 U.S. 130 (1967). In his concurring opinion, Chief Justice Warren reasoned that given the close and sometimes symbiotic relationship between the government and

the private sector, it was highly artificial to distinguish between public officials and "public figures," who often have a pervasive influence on government affairs. He stated further that in light of this inextricable connection between "public figures" and government, the *New York Times* "actual malice" standard should be extended to include published statements concerning public figures:

> Since the depression in the 1930's and World War II there has been a rapid fusion of economic and political power, a merging of science, industry, and government, and a high degree of interaction between the intellectual, governmental and business worlds.... In many situations, policy determinations which traditionally were channeled through formal political institutions are now originated and implemented through a complex array of boards, committees, commissions, corporations, and associations....
>
> ...Our citizenry has a legitimate and substantial interest in the conduct of [public figures], and freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of "public officials."

Id. at 163-64 (Warren, C.J., concurring).

These extraordinary protections for false statements are justified because, as is well recognized, First Amendment freedom of expression must have "breathing space" if it is to survive. *E.g.*, *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 342 (1974); *New York Times Co.* v. *Sullivan*, 376 U.S. at 271-72; *NAACP* v. *Button*, 371 U.S. 415, 433 (1963). However, despite this extraordinary protection, the volume of libel suits brought and the size of damage awards in libel actions have increased dramatically in the last two

decades. 1 A. Hanson, *Libel and Related Torts* vii (1969); Murnaghan, *From Figment to Fiction to Philosophy—The Requirement of Proof of Damages in Libel Actions*, 22 Catholic Univ. L. Rev. 1 (1972). A large damage award constitutes a substantial deterrent to any reporting of the news. A single such award will significantly affect a large organization; it may result in a smaller newspaper's being put out of business. Indeed, even the costs of defending such a suit are enough to deter many publishers from presenting information on important topics to the public. This omnipresent threat of a large libel action results in ever increasing pressure to engage in self censorship to avoid crushing liability. *New York Times Co.* v. *Sullivan*, 376 U.S. at 279. Such a trend should be of grave concern to all citizens and, as in the past, to this Court in particular. *See Gertz* v. *Robert Welch, Inc.*, 418 U.S. at 339-41; *Dombrowski* v. *Pfister*, 380 U.S. 479, 487 (1965); *NAACP* v. *Button*, 371 U.S. at 432.

II. PETITIONER, A PARTICIPANT AT THE CENTER OF A MATTER OF GRAVE PUBLIC CONCERN INVOLVING GOVERNMENTAL AFFAIRS, WHO ATTRACTED MUCH ATTENTION TO HIMSELF, IS A "PUBLIC FIGURE"

In *Gertz* v. *Robert Welch, Inc.*, this Court analyzed the nature of public figures. It concluded that there were two categories of such persons. The first category encompasses those who have achieved pervasive fame or notoriety; the members of that class are public figures "for all purposes and in all contexts." 418 U.S. at 351. The more common type of public figure is an individual who "voluntarily injects himself *or is drawn into* a particular public controversy and thereby becomes a public figure for a limited range of issues." *Id.* (emphasis added). Thus, even though not numerous, a recognized class of persons exist that are limited public figures through involuntary involvement in significant issues of the day. *Id.* at 345.

Amici submit that although the class of involuntary public figures is limited, Petitioner is a member of that class. The instant case does not involve activities of a personal or private nature, wrongfully disclosed by government action. Rather, it involves governmental activities in which Petitioner, either because of his status or activities, became enmeshed. Because of congressional and grand jury investigations in the 1950's into the activities and identities of Soviet agents in the United States, the Petitioner was in the focus of the spotlight illuminating the most publicly discussed issue of the day. Indeed even the extent to which the Congress and the Justice Department should have pursued their investigations and the methods they employed were, and remain today, hotly contested topics. It is undoubtedly true, as the Petitioner's brief in the Court below argues, that Petitioner would rather have not received any public attention. A Soviet agent would hardly have desired public exposure, and an innocent private citizen, especially one whose relatives were convicted agents, would not be expected to relish the scrutiny of a public investigation. However, the Petitioner's celebrity was very real, and the alleged libel does not extend beyond the bounds of the governmental activity that afforded him that celebrity.

The controversy involved in this case, as well as the controversy that gives rise to Respondents' claim that Petitioner is a public figure, is precisely the type of political controversy that this Court sought to remove from the scope of the ordinary common law libel action in order to ensure uninhibited debate. *See Gertz* v. *Robert Welch, Inc.*, 418 U.S. at 339-40. The Petitioner clearly became inextricably involved in a matter of public concern about the activities of its government. Such a relationship is the type envisioned by this Court when it initially extended the actual malice standard to include public figures. *See Curtis Publishing Co.* v. *Butts, supra.*

Although *Gertz* rejects the plurality opinion in *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29 (1971), which extended the actual malice standard to all matters of public interest or concern, *see also Time, Inc.* v. *Firestone*, 424 U.S. 448 (1976), it does not quarrel with Justice White's views that there is "no requirement that the reputation or the privacy of an individual involved in, or affected by ... official action can be spared from public view." 403 U.S. at 62. Justice White also stated:

> Discussion of the conduct of public officials cannot, however, be subjected to artificial limitations designed to protect others involved in an episode with officials from unfavorable publicity. Such limitations would deprive the public of full information about the official action that took place.

Id. at 61.

This approach should be contrasted with that taken in *Firestone*. In that case, this Court concluded that the subject matter of the defamation did not constitute a "public controversy" as that term had been used in *Gertz*. 424 U.S. at 454. The dissolution of marriage through divorce implicates privacy concerns, *cf. Boddie* v. *Connecticut*, 401 U.S. 371 (1971), not present in the discussion of people involved in governmental affairs. As *amici* have noted, the discussion of governmental affairs, which is inseparable from the discussion of the personalities involved, has an exalted place among First Amendment values. Such speech is not only a subject for the solicitude of this Court; it is to be encouraged as a fundamental aspect of the American system. *See Gertz* v. *Robert Welch, Inc.*, 418 U.S. at 339-41; *Garrison* v. *Louisiana*, 379 U.S. 64, 74-75 (1964); *New York Times Co.* v. *Sullivan*, 376 U.S. at 269-73.

Finally, one salient concern that *Gertz* advanced to reject the position of the *Rosenbloom* plurality was the fear of "forcing state and federal judges to decide on an *ad hoc* basis which publications address issues of 'general or public interest' . . . ." 418 U.S. at 346. When, as in the instant case, the controversy in question clearly involves the activities of government, the problem of inconsistent ad hoc analysis is minimized. When the controversy clearly and directly involves the activities of government, the decisional authorities of this Court mandate that individuals who have played a major role in the controversy be deemed public figures.

In any event, *amici* agree with, and urge this Court to accept, the analysis of the court below in holding that Petitioner's behavior drew attention to him such as to make him a voluntary public figure. Although Petitioner's actions were not directed toward making himself a public leader or an opinion molder, he must have realized that in a polarized political climate, ignoring a grand jury subpoena after appearing before a congressional investigating committee would open himself up to searching public scrutiny and comment. Moreover, the passage of time has not changed Petitioner's status as a public figure for the limited issues in which he was involved. The same issues—national security and the proper role of the government in dealing with "subversive elements"—are still present. *Cf. Communist Party* v. *Whitcomb*, 414 U.S. 441 (1974). Moreover, to hold that time will vitiate one's status as a limited public figure would seriously hamper historical inquiry into past events, which is necessary to explicate the present and prepare for the future.

Consequently, the Petitioner's involvement in a governmental matter of intense public interest has made him a public figure for the limited purpose of discussing subversive activities in the United States and governmental counteractions.

III. AS THERE WAS COMPLETE ABSENCE OF ANY QUESTION OF MATERIAL FACT ON THE ISSUE OF ACTUAL MALICE, THE COURT BELOW CORRECTLY GRANTED SUMMARY JUDGMENT

The court below was correct in holding that defendants were entitled to summary judgment upon the ground that plaintiff Wolston was a public figure, and that the evidence raised no genuine issue of material fact with respect to the issue of actual malice. In rejecting the proposition that failure to investigate the validity of public documents raised an issue of malice the court stated:

> We reject the argument that Barron was reckless because he failed to make inquiry to verify the statements in the F.B.I. report. Failure to investigate does not itself establish bad faith or recklessness. *New York Times Co. v. Sullivan*, 376 U.S. 254, 287-88, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964); *St. Amant v. Thompson*, 390 U.S. 727, 733, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968). In any event Barron was entitled to rely upon the report of the F.B.I., one of the great investigative agencies of the world, and to believe that the Bureau's investigative skill and resources far exceeded any that were available to him. Moreover, so far as the Soble case was concerned, the report bore upon its face intrinsic proof of its reliability.

Wolston v. *Reader's Digest Ass'n*, 578 F.2d 427, 434 (D.C. Cir. 1978).

This Court has refined the meaning of the actual malice standard, particularly with regard to what constitutes "reckless disregard." This Court has applied the actual malice standard subjectively, on the basis of the actual state of mind of the particular defendants involved.

St. Amant v. *Thompson*, 390 U.S. 727 (1968); *Garrison* v. *Louisiana*, 379 U.S. at 64. Evidence tending to show malice in the sense of ill will or hatred will not satisfy either part of the actual malice standard, even though it might suffice to defeat a "fair comment" privilege under state law. *Rosenblatt* v. *Baer*, 383 U.S. 75 (1965). Moreover, actual malice in the form of reckless disregard requires "a high degree of awareness of probable falsity." *Garrison* v. *Louisiana*, 379 U.S. at 74. In addition

> reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.

St. Amant v. *Thompson*, 390 U.S. at 731.

In developing these stringent standards of proof, this Court has facilitated the disposition of libel suits at the summary judgment stage when plaintiffs are unable to establish a genuine issue of material fact on the issue of actual malice. Recognizing that prolongation of libel suits involving First Amendment speech might result in self-censorship, lower courts often more strictly observe the summary judgment procedures of Rule 56(e) of the Federal Rules of Civil Procedure. *See* Eckhardt & McKey, "*Caldero v. Tribune Publishing Co.: Substantive and Remedial Aspects of First Amendment Protection for a Reporter's Confidential Sources.*" 14 Idaho L. Rev. 21, 50 n.193 (1977) (including partial list of more than forty such decisions).

Courts that have adopted the position that First Amendment considerations should facilitate summary judgment have expressed the principle in different ways.

They have said, for example, that summary judgment procedures are "an integral part of constitutional protection afforded defendants," *Cerrito* v. *Time, Inc.*, 302 F. Supp. 1071, 1075 (N.D. Cal. 1969), *aff'd per curiam*, 449 F.2d 306 (9th Cir. 1971); are the proper vehicle for disposition of cases under the *New York Times* rule, *LaBruzzo* v. *Associated Press*, 353 F. Supp. 979, 982 (W.D. Mo. 1973); are even more essential than in other cases, *Washington Post Co.* v. *Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966); and, that summary judgment should be "particularly utilized," *Novel* v. *Garrison*, 338 F. Supp. 977, 980 (N.D. Ill. 1971). Thus, according to the Fifth Circuit, "where a publication is protected by the *New York Times* immunity rule, summary judgment, rather than that on the merits, is a proper vehicle for affording constitutional protection in the proper case." *Bon Air Hotel* v. *Time, Inc.*, 426 F.2d 858, 864-65 (5th Cir. 1970); *accord*, *Time, Inc.* v. *McLaney*, 406 F.2d 565, 566 (5th Cir.), *cert. denied*, 395 U.S. 922 (1969).

A considerable number of other courts, however, appear to be granting summary judgment in cases involving New York Times on the basis of traditional principles, unmodified by First Amendment considerations. *See, e.g.*, *Guam Federation of Teachers* v. *Ysrael*, 492 F.2d 438, 441 (9th Cir.), *cert. denied*, 419 U.S. 872 (1974); *Truetler* v. *Meredith Corp.*, 455 F.2d 255, 258 (8th Cir. 1972); *Hensley* v. *Life Magazine*, 336 F. Supp. 50, 53-54 (N.D. Cal. 1971). Because of the danger that libel threats pose of creating self-censorship, *amici* urge this Court to adopt a rule recognizing that a motion for summary judgment is an integral part of the constitutional protection afforded to an individual exercising First Amendment rights to comment on public figures.

CONCLUSION

WHEREFORE, in view of the above, *amici* respectfully request that this Court affirm the judgment of the United States Court of Appeals for the District of Columbia Circuit, thereby vindicating the freedom under the First Amendment to discuss matters and persons of governmental interest without fear of reprisal, which would inevitably result in self-censorship.

Respectfully submitted,

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